



POWER POLICY PEOPLE

A study of driver licensing administration

JOHN H. REESE
UNIVERSITY OF DENVER

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FOREWORD

The National Law Center of The George Washington University has for many years given major emphasis to public law and in particular to the administrative process wherein governmental actions may directly affect participants in the private sector, whether individuals or corporations. There has been an effort to examine the role of law in its interaction with other social processes. Put otherwise, there has been an effort to *integrate* legal process with other institutional functions rather than to *abstract* law from the total social process.

Clearly, one of the most significant and pressing areas for inquiry in terms of this contextual approach to the development of socially desirable policies, legal doctrine, and implementing institutions is that of driver licensing administration. Timely and generous support from the Highway Users Federation for Safety and Mobility provided the opportunity for Professor Reese to make the scholarly and comprehensive analysis of the subject presented here.

This study deals with one of the truly critical social activities in our society. It is impossible to conceive of the social environment without the private automobile. The scale of use is staggering; there were approximately 111.5 million motor vehicles in use in the United States as of 1970, and the rate of increase was roughly twice that of the rate of population growth. The automobile has become almost indispensable to most people. It is the ultimate expression of the "liberty of mobility." But this extensive use also involves substantial social costs. A complex of significant social interests is involved in the use or restrictions on use of the automobile. Professor Reese's study undertakes to clarify such interests. It recommends that criteria reflecting such interests be explicitly

developed for the administration of the licensing function. This development will require more systematic approaches to the formulation of administrative guides and the application of such criteria to individual cases. It also requires more sophisticated judicial review of the administration of the licensing function. With the new level of concern over the quality of the social and natural environments and the possibility, at least, of the imposition of severe restrictions on automobile use, it will become increasingly important that explicit and socially responsible criteria be applied to determine who can drive when and where and for what purposes.

In addition to the relevance of this study for more adequate performance in the area of driver licensing administration, it offers us a thoughtful, compelling lesson. The study demonstrates beyond question the need for approaching major social problem areas in terms of the full context of people, organizations, institutions, and social values affected. In brief, it shows the necessity for the data inputs and methodological skills of all professional groups whose subject matter areas affect or are affected by the activity examined. The formulation of socially desirable policies and their implementing rules and regulations are the result of the identification of the full range of effects flowing from a given activity and the deliberate calculation of the magnitude of the social desirability or undesirability of such effects. In a context impinging on the social process to the extent of private automobile use, this task requires the application of a variety of skills, not merely those characteristic of the legal profession.

Over the past 20 years I have had the opportunity to review numerous articles, monographs, and studies by my colleagues in the legal profession and a variety of studies used or produced by our university's Program of Policy Studies in Science and Technology. Professor Reese's work presented here stands out as one of the most prodigious and productive "one-man" efforts that it has ever been my pleasure to review. He has shown a degree of diligence, an ability to apply the findings of other scholars, and an excellence in analysis that should serve as a model and a challenge to all who are oriented to the solution of social problems rather than to the infinite refinement of specialized aspects of total problem concepts. Professor Reese's approach definitely portends a critically important trend in the application of our vast, and largely unused or misused, intellectual resources.

LOUIS H. MAYO.
*Vice President for
 Advanced Policy Studies
 The George Washington University*

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As is true of most research projects, this one would not have been completed without the assistance of a number of people and organizations. Accordingly, a statement of appreciation is in order.

The research leading to this publication could not have been undertaken without the generous support of the Automotive Safety Foundation. Initially, a fellowship grant to the National Law Center of The George Washington University led to research that culminated in *The Legal Nature of a Driver's License* (1965). That document laid the jurisprudential foundation on which the research for this publication was based. In 1965 the ASF renewed the earlier fellowship grant to permit continuation of the research. Finally, upon completion of the project, the ASF made publication possible through a grant to the Highway Research Board. I am especially indebted to my friends Louis Morony, Mason Mahin, and Victor Perini of the Highway Users Federation for Safety and Mobility professional staff for their active support of the research project and the publications that followed. Their individual efforts were largely responsible for the continuing financial aid that was essential.

For assisting in the conceptualization and organization of the research and for their valuable suggestions and criticisms, a word of thanks is due Professors Louis H. Mayo and Arthur S. Miller of The George Washington University, Professor Frederick Davis of the University of Missouri, Dr. Ross Netherton of the United States Department of the Interior, and my faculty colleagues at the University of Denver. When the need arose to talk through a problem, one or more of these persons always seemed to be available to listen and provide insights that would get the project moving again.

Mr. Howard Beck, law clerk to the Colorado Supreme Court, was my "right-hand-man" for the organization, editing, and production of the research manuscript. Without his personal interest in the success of the project, it would not have been completed on schedule.

Because of its length, the research manuscript required further editing and some reorganization for publication. Mr. Michael Goldner assisted ably in reducing the size of the manuscript without losing the essentials in the process. My student research assistants, Mr. Miles Winder and Mr. Matthew Feiertag, performed the thankless task of checking the publication draft for accuracy and conforming it to the original document. Significant contributions were also made by Mr. James Barda, Mr. Bernard McNulty, and Mr. Frank Wright. The document was typed by Mrs. Lois Visconti, assisted principally by Mrs. Darlene Warner and Miss Diann Rathburn.

A word of appreciation must also be addressed to Dean Robert B. Yegge and Assistant Dean John C. Hanley of the College of Law of the University of Denver. They were generous in their support of the project by making available to me the editorial and secretarial staff and the student assistants on whom I relied so heavily.

Finally, recognition must be given my wife, Mary Anne Reese, who read every word of every draft despite her responsibilities as housewife and mother of three. Her counsel is reflected in the product.

To all these persons and those whom I may have thoughtlessly forgotten to mention by name, I am grateful.

JOHN H. REESE
Denver, Colorado
January 1971

INTRODUCTION TO THE STUDY

This study consists of an analysis and synthesis of driver licensing administration in California, Florida, Illinois, Indiana, Michigan, New Jersey, New York, Ohio, Pennsylvania, and Texas. Within these 10 states are 54 percent of the motor vehicles registered in the United States, 13 of the 20 largest metropolitan areas in the nation, 54 percent of the nation's licensed drivers, and 53 percent of all vehicle miles traveled annually in the United States. In 1967 48 percent of the nation's traffic deaths occurred in these states. Presumably, then, these 10 states account for a majority of the nation's efforts to control drivers through licensing administration.

The thrust of this study is toward the substantive aspects of licensing administration. Administrative law has been generally assumed to be concerned solely with the procedures by which agencies implement statutory authority. However, one of the premises of this study is that sophisticated procedures of administration do not legitimate improper or illegal substantive policies no matter how fairly they are implemented. Thus, administrative law is assumed to consist of both substantive and procedural components. Because prior legal research has placed so much emphasis on the procedural aspects of administration at the expense of its substantive aspects, focus on substantive policies is believed justified. Furthermore, it is arguable that research resources need not be expended on analysis of procedural techniques until the substantive criteria to which they relate have been analyzed and validated.

In this sense the study does not represent the usual approach taken to analysis of the administrative process. Although Professor Kenneth Davis excludes from his definition of administrative law the substantive law

created by an agency, he has apparently come to the conclusion that it does, indeed, include a substantive component. This is the thrust of his recent book, *Discretionary Justice*.

POWER

Part I of the study describes the constitutional sources of authority that permit both federal and state legislatures to establish driver licensing programs. In addition, it assumes that the administrative agency is a legitimate "fourth branch" of government which, in fact, possesses the actual power to govern despite protestations that the agency concept violates constitutional non-delegation principles. No state has ever declared unconstitutional its driver licensing program on non-delegation grounds. The purpose of this section is to impress upon readers—particularly motor vehicle administrators and their lawyers—that agencies are the actual possessors of the power to govern, that the power has been transferred to them through statutes, and that it is legitimate for them to have this power base.

In the process of demonstrating the principle of transferred power, there is included a description of the licensing programs that have been created. Statutory quotations are analyzed to demonstrate that the vagueness of the statutory language is the mechanism by which power to govern is transferred from legislature to agency. The practice of transferring power is well established in the federal government but seems to be questioned in some quarters of state government. Some state motor vehicle administrators insist that they have no real policy-making authority and must turn to the legislature for a statutory modification each time a licensing program change is indicated. In short, some state officials fail to understand the fact that statutory rule-making authority vests in them a responsibility to make the substantive law of driver licensing. Furthermore, some state officials fail to recognize that, in effect, they create and accumulate "law" as they make licensing decisions in individual cases. Thus they tend to assume erroneously that all they do and all they are authorized to do is decide cases on an ad hoc basis. Hence, in driver licensing administration the rule-making authority is little used.

POLICY

POLICY is the fulcrum on which assertions of POWER and interests of PEOPLE are balanced in the administrative process. Therefore, identification and analysis of the formal agency policies are imperative to a study of driver licensing administration. Part II of the study describes driver licensing POLICY in the 10 states from a macrocosmic perspective.

The goal of driver licensing is commonly stated to be not punishment but prevention or correction of deviant driver behavior that leads to involvement in an accident. It is incorrect to describe the goal of driver

licensing to be "highway safety." Driver licensing is merely one of several subsystems that comprise the systems approach to highway safety. It is assumed that by attacking driver problems, vehicle problems, and highway problems the goal of "highway safety" may be achieved. Driver licensing is not designed to and should not be expected to accomplish more than the identification of applicants and licensees who may be predicted to fail as drivers and become involved in accidents. The overall goal of "highway safety" is too broad a referent to attach to a subsystem having limited objectives.

Part II attempts to blend scientific prediction with policy making. Accordingly it is assumed that, if sound research has not shown a particular driver characteristic to be a valid predictor of future driving failure, there is no justification for its application in a driver prediction-selection system. Poor science (*i.e.*, poor prediction) may be criticized as bad law (*i.e.*, poor policy) for it accomplishes nothing for highway safety. All it does is deprive PEOPLE of the enjoyment of the valuable interests expressed by driving motor vehicles. Where the POLICY applied does not predict driver failure, it may be argued that there is no rational relationship between the POWER assertion and the goal addressed. If so, there is an unjust denial of the liberty of PEOPLE in the POWER-PEOPLE conflict that arises. Accordingly, the various predictors used in driver licensing programs are evaluated in terms of accident research that has attempted to assess their validity as predictors of driver failure.

The text relevant to the state role in driver licensing is structured functionally: (a) the licensing process, (b) withdrawal of licenses, and (c) restoration of licenses. The summary discussion of the federal role centers on the National Highway Traffic Safety Administration (NHTSA) and its standards-setting function. [The bulk of federal involvement occurs through the NHTSA and its predecessor, the National Highway Safety Bureau. A detailed analysis of the licensing activities of the NHTSB is given in J. REESE, *The Federal Highway Safety Act of 1966: NHTSB Driver Licensing Standard—Power Not Used*, 47 DENVER L. J. 408 (1971).]

PEOPLE

Part III of the study considers the legal controls that may be imposed on driver licensing administrators in behalf of PEOPLE. It begins with a discussion of the current social necessity of the privately owned motor vehicle.

The legal analysis presented in this section is based, in part, on a complementary research effort of this author published as *The Legal Nature of a Driver's License* (1965). It includes a discussion of U. S. Supreme Court cases establishing that the right to travel is constitutionally protected. Likewise, state cases that give legal recognition to the valuable social interests expressed by driving a motor vehicle are discussed. Simi-

larly, statutory recognition of the need to express liberty of mobility by driving a motor vehicle is included.

A conclusion is drawn that in contemporary American society the motor vehicle is the primary mode by which the American public expresses its constitutional right to travel. Since being licensed to drive is a prerequisite to the operation of a vehicle, licensing is believed sufficiently related to constitutional liberty of mobility to justify legal recognition and protection.

A concept of positive due process-equal protection is used to provide a basis for developing legal means to protect the interests of PEOPLE in driving motor vehicles. It is believed possible for courts to engage in a form of review of substantive administrative policy that does not involve the court in substituting its wisdom for that of the agency. Licensing agencies are recognized as legitimate policy-making bodies, but it is insisted that whatever policy is established must be made known to the public. It is assumed that, in the nature of things, if courts do not perform the control function, it will not be performed. Development of effective controls over substantive policy making of driver licensing agencies by legislatures or executive branches of government is not believed to be realistically possible. The development of such legal controls is not designed to destroy agencies, but merely to control them in behalf of the interests of PEOPLE.

If courts are to make a bona fide due process-equal protection review of agency action, the substantive criteria of decision must be made known to them. Courts usually insist on agency statements of findings and conclusions as a normal part of their review. However, these statements may be rationalizations created after the actual criteria of decision (which remain unknown) have been applied. The rationales stated may mask the real basis of decision. Thus court review is rendered faulty. If limited court review is to be effective, it is imperative that the actual criteria of decision be made known.

Driver licensing agencies control the activities of such large masses of PEOPLE that it must be assumed they have standardized and quantified their substantive policies. Because of the mass responsibility of the licensing agency, it is not feasible to publish its licensing decisions as FCC, ICC, and SEC opinions are published. Therefore, the appropriate legal control measure appears to be court insistence on articulation of standards and criteria of judgment in the form of rules and regulations. The availability of rules and regulations would permit limited court review of agency policy making and agency licensing decisions without undermining the authority of the agency.

If it can be established that courts have a legitimate role in requiring the articulation of licensing decision criteria, limited court scrutiny of individual licensing decisions and the decision criteria applied should contribute to the development of an acceptable POLICY balance between the POWER assertions of government and the interests of PEOPLE who desire to drive motor vehicles.

PART I

POWER

1 CONSTITUTIONS AS FORMAL SOURCES OF HIGHWAY SAFETY POWER

UNITED STATES CONSTITUTION

Legislative Power

The legislative power of the national government is vested in a bicameral Congress.¹ Does it possess a zone of power insofar as highway safety is concerned? A consideration of only the constitutionally enumerated areas of congressional competence suggests at least four power zones that may be said to encompass highway safety. They are the commerce,² general welfare,³ and perhaps the compact⁴ and post roads⁵ powers.

The evolution of the commerce clause as a power base from *Gibbons v. Ogden*⁶ through *Champion v. Ames*⁷ to *Darby Lumber Company*⁸ and *Wickard v. Filburn*,⁹ *Heart of Atlanta Motel*,¹⁰ and *Katzenbach v. Mc-*

¹ U.S. CONST. art I, § 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

² U.S. CONST. art. I, § 8: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . . ."

³ *Id.* art. I, § 8: "The Congress shall have power . . . to pay the debts and provide for the common defence and general welfare of the United States. . . ."

⁴ *Id.* art. I, § 10.

⁵ *Id.* art. I, § 8: "The Congress shall have power . . . to establish post offices and post roads. . . ."

⁶ 22 U.S. (9 Wheat.) 1 (1824).

⁷ 188 U.S. 321 (1903).

⁸ *United States v. Darby*, 312 U.S. 100 (1941).

⁹ 317 U.S. 111 (1942).

¹⁰ *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241 (1964).

*Clung*¹¹ need not be described in detail. It would seem the broad reading that these cases have given the congressional power over commerce would lay to rest any serious doubt that the Court would sustain highway safety legislation based on the commerce power. Furthermore, the U. S. Supreme Court impliedly recognized latent power in Congress in the highway safety area in the early case of *Hendrick v. Maryland*.¹² It was there held that the state of Maryland had the authority to require a District of Columbia resident temporarily using its highways to register his vehicle or secure permission to operate it as a nonresident. In the course of its opinion the Court suggested the existence of a paramount, but unexercised, power of Congress to enter the field: "In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. . . ." ¹³

By this language the Court implied not only power in Congress to legislate but also power to preempt the area and supplant the regulations of the various states with its own.¹⁴ However, unless the Congress does so affirmatively, state regulation is permitted so long as its measures do not unduly burden¹⁵ or discriminate¹⁶ against interstate traffic.

Congressional power to spend for the general welfare has been approved by the Court in such broad, unlimited terms as to allow comprehensive federal programs in a multitude of areas of national concern.¹⁷ The only limitation on this power is that its use must relate to some national—as distinguished from local—purpose or problem.¹⁸ Furthermore, the technique of attaching conditions to federal grant-in-aid funds is permissible so long as the conditions bear a relation to the national purpose or problem.¹⁹

¹¹ 379 U.S. 294 (1964).

¹² 235 U.S. 610 (1915).

¹³ 235 U.S. 610, 622 (1915). The Court reaffirmed this position in *Kane v. New Jersey*, 242 U.S. 160, 167-168 (1916).

¹⁴ *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, n. 5, at 524 (1959). Cf. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945); compare, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). See also *Cooley v. Bd. of Wardens of the Port of Philadelphia*, 12 How. 299 (1851).

¹⁵ *Id.*

¹⁶ *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938). Cf. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959). Compare *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). See also *Cooley v. Bd. of Wardens of the Port of Philadelphia*, 12 How. 299 (1851).

¹⁷ *Helvering v. Davis*, 301 U.S. 619 (1937); see *Steward Machine Co. v. Davis*, 301 U.S. 548, 593-98 (1937); *United States v. Butler*, 297 U.S. 1 (1936).

¹⁸ *Helvering v. Davis*, 381 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 648, 593-98 (1937); *United States v. Butler*, 297 U.S. 1 (1936).

¹⁹ *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127 (1947). Despite an argument that such legislation violated the 10th amendment, the Supreme Court upheld withdrawal of a portion of Oklahoma's share of federal highway funds for failing to remove from office a member of the State Highway Commission who took an

The federal compact power²⁰ is a unique, negative sort of power and is to be distinguished from the commerce and general welfare powers. It is included, however, because its use implies congressional approval of interstate arrangements between states. Such agreements could perhaps be useful in highway safety programs, since the problems involved transcend the artificial boundaries of the states. Compacts have been useful, for example, in the creation of the New York Port Authority, multi-state flood control programs, pollution control, and allocations of interstate stream waters.²¹

Since the Constitution confers power on the Congress to "establish post-offices and post-roads,"²² by implication this power could be used to support federal highway legislation. The Cumberland Road was federally constructed and in part maintained with federal funds.

Whatever the power base, the fact is that Congress has legislated in the area of highway development through creation of the federal-aid highway systems,²³ the Interstate System²⁴ of highways, and other highway systems including, for example, forest highways, park roads and trails, Indian reservation roads, and public lands highways.²⁵ There seems to have been no serious question raised as to the validity of these programs,²⁶ and, presumably, on such a legislative base the Congress could also establish a highway safety program.

In summary, it would seem to be reasonable to assume that any one or a combination of these formal congressional power bases would indeed support federal legislation injecting the national government into the highway safety field.

Judicial Power

The sequence of decisions emanating from the U. S. Supreme Court early in the 19th century clearly put the Court into the legal-policy

active part in political activities. His actions constituted a violation of the Hatch Act, 5 U.S.C.A. § 7324 (1967), which forbade political activities financed in whole or in part with federal funds. *Helvering v. Davis*, 301 U.S. 619 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); see *United States v. Butler*, 297 U.S. 1 (1936) (dissenting opinion of Mr. Justice Stone).

²⁰ U.S. CONST. art. I, § 10: "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power. . . ."

²¹ For a detailed treatment of the potential use of compacts to attack regional problems that do not confine themselves to state boundaries, as well as for analysis of several existing compacts, see Dixon, *Constitutional Bases for Regionalism: Centralization, Interstate Compacts, Federal Regional Taxation*, GEO. WASH. L. REV. 47, 55-78 (1964).

²² U.S. CONST. art. I, § 8.

²³ 23 U.S.C. § 183 (2-c) (1966).

²⁴ *Id.* at (d).

²⁵ 23 U.S.C. § 201 (1966).

²⁶ See *Marney v. United States*, 306 Fed. 2d 523 (1st Cir. 1962), cert. denied 371 U.S. 911 (1962), which indicates federal highway aid to states is a lawful function of the United States.

process as a full partner with the legislative and executive departments. The significance of cases such as *Marbury v. Madison*,²⁷ *Martin v. Hunter's Lessee*,²⁸ *Cohens v. Virginia*,²⁹ and a more recent case, *Cooper v. Aaron*³⁰ is to establish beyond doubt the power of the U. S. Supreme Court to appraise the conformity of formal legislative-executive policy decisions of both federal and state governments with the U. S. Constitution and declare invalid those decisions that are found to conflict with its provisions.

It is this power position that permitted the U. S. Supreme Court to balance state police power interests against federal interstate commerce interests and conclude in *Hendrick v. Maryland*³¹ that it was permissible for states to regulate interstate traffic on highways absent any federal legislation preempting the field, despite the fact that a potential legislative power exists in the U. S. Congress.

The court determines whether there is, indeed, a federal-state conflict or a power-liberty confrontation. Thus, it would confirm or deny the power of Congress to enter the highway safety field in the manner and to the extent specified by the legislative enactment. The Court would also decide whether a federal safety program constitutes an unwarranted invasion of individual liberties, for it determines both the scope of the power bases of federal and state governments and the extent of the protected zones of liberty. The Court gives authoritative definition to the scope of the constitutional expressions describing basic individual rights.

Executive Power

In the era of the "administrative state,"³² it would be impossible to ignore the fact that the federal executive department is a power-wielding organ of government. The President and his administrative family are probably the dominant policy-initiating group on the national scene. Regular submission of a legislative program to the Congress, control over the government bureaucracy and its budget, and the prestige of the office itself combine to enhance the President's authority beyond the skimpy language base of the Constitution.³³ The "gloss which life has written"³⁴

²⁷ 1 Cranch 137 (1803).

²⁸ 1 Wheat. 304 (1816).

²⁹ 6 Wheat. 264 (1821).

³⁰ 358 U.S. 1 (1958).

³¹ 235 U.S. 610 (1915).

³² A. Miller, *Some Pervasive Myths About the United States Supreme Court*, 10 *St. Louis U.L.J.* 153, 186 (1965), and authorities cited therein.

³³ See the discussion of specified powers and their enhancement in C. BLACK, *Perspectives in Constitutional Law* 56-59 (1963). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1962).

³⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (concurring opinion of Mr. Justice Frankfurter).

upon the words of the Constitution cannot be ignored. Furthermore, Congress has steadily added to the powers of the Executive.³⁵

STATE CONSTITUTIONS

The constitutions of the states in the study group are similar to that of the federal government in that all adopt the Locke-Montesquieu concept of a tripartite separation of powers³⁶ and all contain either a Bill of Rights,³⁷ a Declaration of Rights,³⁸ or a statement of Rights and Privileges.³⁹

Despite differences in constitutional language, some of which implies absolute inalienability,⁴⁰ various expressions of life, liberty, or property are, nevertheless, subjected to governmental regulation for the public good. No individual natural right is absolutely inviolable according to the Locke-American ideology.⁴¹

The Problem of Dual Sovereignty

In our federal structure with the federal Constitution declaring the supremacy of the federal power in the areas it encompasses,⁴² it is misleading to speak of state and federal governments as dual sovereignties. The fact is that states are subordinate to the federal government in many respects. This is essential to a workable federalism.⁴³ The dual sovereignty concept is legitimated in part by the 10th amendment and its language reserving the non-delegated powers to the states or the people.⁴⁴ This permits an argument that the relationship between states and the federal government was crystallized or fixed when the federal Constitu-

³⁵ BLACK, *supra* note 33 at 59. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (especially the concurring opinion of Mr. Justice Jackson).

³⁶ CAL. CONST. art. III, § 1; FLA. CONST. art. II; ILL. CONST. art. II; IND. CONST. art. III, § 1; MICH. CONST. art. IV, §§ 1, 2; N.J. CONST. art. III, § 1; N.Y. CONST. art. III, IV, V, VI; OHIO CONST. art. II, III, IV; PA. CONST. art. III, IV, V; TEX. CONST. art. II, § 1.

³⁷ ILL. CONST. art. II, §§ 1-20; IND. CONST. art. I, §§ 1-37; N.Y. CONST. art. I, §§ 1-18; OHIO CONST. art. I, §§ 1-20; TEX. CONST. art. I, §§ 1-29.

³⁸ CAL. CONST. art. I, §§ 1-25; FLA. CONST., Declaration of Rights §§ 1-24; MICH. CONST. art. I, §§ 1-23; PA. CONST. art. I, §§ 1-26.

³⁹ N.J. CONST. art. I, §§ 1-21.

⁴⁰ *E.g.*, TEX. CONST. art. I, § 29: "To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provision, shall be void."

⁴¹ *Infra* Introduction to Part III.

⁴² U.S. CONST. art. VI.

⁴³ K. LOWENSTEIN, *POLITICAL POWER AND THE GOVERNMENTAL PROCESS* 286-289 (1957). *Cohens v. Virginia*, 6 Wheat. 264 (1821). See also *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

⁴⁴ U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

tion was ratified. Any attempt to modify that original power balance other than by amending the Constitution is said to be unconstitutional. Obviously any modification by the U. S. Supreme Court through adopting a broad reading of the necessary and proper clause⁴⁵ in conjunction with a specific power grant or by using a functional methodology of constitutional interpretation would be unacceptable.

Nevertheless, with the rapid evolution of 20th-century America from an agrarian, localized, multi-market, stable society into an industrialized, national, single-market, highly mobile society, many unforeseen problems arose that, in the contemporary setting, may be viewed as national in scope. In addition, old problems once characterized as local have become national problems.⁴⁶ The legal effect of the processes of socioeconomic change has been pressure for an expansive reading of the enumerated national powers by the U. S. Supreme Court. With some hesitation, the Court yielded to these pressures.⁴⁷

When broadly read powers are combined with the supremacy clause, the effect on the power balance is one of continuing expansion of federal power zones at the expense of state power.⁴⁸ In some areas the states have abdicated their responsibilities to the public by doing nothing to solve its problems.⁴⁹ In other areas the nature and magnitude of the problems have rendered the states virtually powerless.⁵⁰

In summary, as pleasant as phrases such as "dual sovereignty" and "states' rights" may sound, the fact is that the Supreme Court has, especially since 1937, refused to consider the federal-state power balance so crystallized as to prevent national action to solve problems believed by Congress to be national in scope or to have become national in scope.⁵¹

Legislative Power

As we have seen, early in the 20th century the Supreme Court characterized highway safety problems as essentially local and gave its blessing to state efforts toward their solution.⁵² The Court went so far as to per-

⁴⁵ U.S. CONST. art. I, § 8: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." *United States v. Darby*, 312 U.S. 100 (1941); *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

⁴⁶ Highway safety is an obvious illustration. See the discussion in Chapter 3 *infra*.

⁴⁷ *E.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *overruled* by *United States v. Darby*, 312 U.S. 100 (1941). See C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 28-32 (1963).

⁴⁸ BLACK, *supra* note 47, at 29-32. See LOWENSTEIN, *supra* note 43, at 292-296.

⁴⁹ *E.g.*, the whole congeries of urban problems and pollution problems.

⁵⁰ The widespread personal economic disasters of the depression years are perhaps the best examples. More recent examples would include atomic testing and technology assessment.

⁵¹ *Miller*, *supra* note 32, at 179-180, 185.

⁵² *Kane v. New Jersey*, 242 U.S. 160, 167-68 (1916); *Hendrick v. Maryland*, 235 U.S. 610 (1915).

mit state regulation of interstate traffic absent federal intervention.⁵³ This was not conceptually difficult, for the "police power" is a characteristic of sovereignty that was not surrendered to the national government and that is vested primarily in the state legislatures.⁵⁴

This inherent power of the sovereign to do what is necessary to promote the general welfare provides a power base ample to support state legislatures in their attempts to regulate highway traffic in the interest of public safety.

Consistent with the thinking of John Locke, the police power is—as are all powers of government—limited to legislation designed to promote the public good, and because its exercise curtails individual freedoms, its use must be carefully scrutinized to be certain there is no undue invasion of individual liberty.

But it must not be forgotten that the state police power may be subordinated to federal power in the area of highway safety. In terms of the federal-state power balance, there is little doubt the Congress could totally preempt the entire highway safety field—interstate and intrastate—by using the broad powers discussed earlier. Of course, Congress might choose a "halfway house" policy of partial preemption of the area and enter into partnership with the states.⁵⁵

Judicial Power

That the judicial departments of the states also wield power in the policy-making process follows from the fact that they occupy the same position vis-à-vis the state legislative and executive departments as does the Supreme Court at the federal level. What has already been said about the power of the Supreme Court through judicial review, not only to *apply* legislative-executive policy norms but also to *participate* in the making of policy, applies equally to state courts.⁵⁶ The state courts de-

⁵³ *Id.*

⁵⁴ T. COOLEY, CONSTITUTIONAL LIMITATIONS, 1231-1232 (8th Ed. 1927). See also *Frost v. City of Los Angeles*, 183 P. 342, 181 Cal. 22 (1919); *Petition of Fla. Bar Ass'n* 40 S. 2d 902 (1949); *City of West Frankfort v. Fullop*, 129 N.E. 2d 682, 6 Ill. 2d 609 (1955); *Edwards v. Housing Authority of City of Muncie*, 19 N.E. 2d 741, 215 Ind. 330 (1939); *People v. Piasecki*, 92 N.W. 2d 626, 333 Mich. 122 (1952); *Kraus v. City of Cleveland*, 127 N.E. 2d 609, 163 Ohio St. 559, (1955); *appeal dismissed* 351 U.S. 935 (1955); *Appeal of Goodman*, 156 A. 300, 305 Pa. 55 (1931); *Texas Underwriters v. Martinal*, 140 S. W. 2d 582 (Tex. Civ. App. 1940). *City of El Paso v. Simmons*, 379 U.S. 497, 508-509 (1965).

⁵⁵ In effect it did so by enactment of the Highway Safety Act of 1966, 23 U.S.C. 401-404.

⁵⁶ *Lockard v. Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38 (1949), *cert. denied* 337 U.S. 939 (1949); *State ex rel. Huneen v. Greer*, 88 Fla. 249, 182 So. 739 (1924); *Joseph Triner Corp. v. McNeil*, 363 Ill. 659, 2 N.E. 2d 929 (1936); *Ellingham v. Dye*, 178 Ind. 336, 99 N.E. 1 (1912), *error dismissed* 231 U.S. 250 (1913); *Sherill v. O'Brien*, 188 N.Y. 185, 81 N.E. 124 (1907); *State v. Robins*, 71 Ohio St. 273, 73 N.E. 470 (1905); *Page v. Allen*, 58 Pa. 338 (1868).

fine the periphery of the legislative and executive power grants of the state constitutions. The state courts determine whether there is a conflict between some governmental policy and the individual's constitutional rights to life, liberty, and property. Most important, however, is the power of the state courts to decide what balance should be struck when such an authority-liberty conflict is found to exist. As do federal courts, state courts evaluate the competing interests of authority (POWER) and liberty (PEOPLE) and determine which is to prevail. Further, state courts have the power and the duty to declare state legislative-executive policy void if in violation of the U. S. Constitution.⁵⁷

Executive Power

The role of the state executive is not generally so extensive in policy making as is that of the President. The coming of the "administrative state" has not brought about the same shift of power to the state executive as occurred at the federal level.⁵⁸ The primary allegiance of state administrative agencies is to the legislature and not the governor, for in most states agencies create their own legislative policy and budget requests. Little or no policy or budget control power is enjoyed by the governor.⁵⁹ Hence, it is typical for the bulk of the formal state policy initiative to remain in the legislative body.

⁵⁷ U.S. CONST. art. VI: "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. . . ." See *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

⁵⁸ Such a power shift was described by Leslie Lipson in *The American Governor: From Figurehead to Leader* in 1939. Although his contentions may have been valid at that time, the succeeding 30 years of state government do not appear to bear him out. See RANSOME, *THE OFFICE OF THE GOVERNOR IN THE UNITED STATES* (1956) at 166:

It should also be pointed out that in many of the forty states with an executive budget the budget document seldom reaches the high goals set for it as a policy device. One of its primary limitations is the fact the budget actually covers only a part, sometimes as little as one-quarter of the state's income and expenditures, since the majority of the state's income is from earmarked revenues which are dedicated to predetermined purposes.

Also at 220:

The fact that the statutes establish an executive budget or a merit system and that a state is listed in the standard references as being among the merit-system states or among those states with an executive budget does not mean this is actually the case. A closer look at one of these states may reveal that, in fact, the governor does nothing more than pass departmental estimates along to the legislature and that by custom his so-called "budget message" is actually ignored by that body.

⁵⁹ *Id.* But see CAVE & WALKER, *HOW CALIFORNIA IS GOVERNED* (1953). According to these authors, California is a notable exception. The governor of California presents a budget prepared by the Department of Finance, the functions of which are similar to the Bureau of the Budget in the Executive Office of the President of the United States. The governor's policy power through budget control is analogous to that of the President.

2 THE PRINCIPLE OF TRANSFERRED POWER: THE HEADLESS "FOURTH BRANCH"

FEDERAL GOVERNMENT

Separation of Powers

The mere notion of something approaching a viable *fourth* branch¹ of American government appears to be in such total conflict with the Locke-Montesquieu philosophy as to be unthinkable and certainly unconstitutional. However, we learned from Madison in *The Federalist*² that Montesquieu was not to be read as forbidding *all* overlapping, *all* blending, *all* combining of the tripartite powers of government. So long as one department was not wholly dominated by another, there was no violation of the doctrine of separation of powers through the blending.

In 1881 in *Kilbourn v. Thompson*,³ the U. S. Supreme Court said the branches of government could not be permitted to encroach upon each other but must exercise powers appropriate to their own departments and no other.⁴

Nonetheless, the legislative practice of blending governmental powers

¹ The phrase, "the headless 'fourth branch'" appears in the *Report of the President's Committee on Administrative Management* 39 (1937), and is used to describe the federal administrative agency establishment.

² J. MADISON, *THE FEDERALIST*, No. XLVII at 329 (1788) (Dunne ed. 1901).

³ 103 U.S. 168 (1881).

⁴ *Id.* at 191: "In all tyrannical governments, the supreme magistracy, or the right both of making and enforcing the laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty." 1 BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 146 (7th ed. 1775).

in administrative agencies has become commonplace at the federal level despite Montesquieu and *Kilbourn v. Thompson*.⁵ Protection from federal government despotism at the hands of the "fourth branch" must, therefore, rest on some basis other than the formality of the separation doctrine.

It is too late in the day to attack the very existence of the administrative agency and ridicule it as an illegitimate tool of America's positive federal government. It is not too late, however, to insist on continued development of more equitable administrative procedures and more rational, substantive policy making by agencies to control blended power more effectively.⁶

Delegation of Power

Another constitutional issue that accompanies the blending of powers in an administrative agency is that of delegation of power. In theory only the legislature itself can exercise legislative power, for to permit its use by another would be to violate the trust owed the people who elected the members of the legislature. If delegation of that power occurs, it is exercised by parties not responsible to the electorate.⁷ Hence, in *Field v. Clark*,⁸ the U. S. Supreme Court stated flatly that the Congress could not delegate legislative power to the President.⁹ Therefore, it would follow that "law" must be made by the Congress. With this principle established in Supreme Court opinions, some device had to be found to avoid the language of the cases each time it became necessary to create another organ of government within the "fourth branch." A favorite device that emerged was to continue to parrot the non-delegation principle but to say it was not violated so long as the legislative body articulated sufficiently precise standards in the legislation establishing the agency and describing its program responsibilities.¹⁰ Such statutory standards were expected to circumscribe the power of the agency and require it to act in accord with a predetermined legislative policy. Agencies would not make legal policy according to their own desires but would merely apply, with interstitial amplification, a policy stated for them by the legislative branch.

The difficulty with this control device is that it requires almost super-

⁵ *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (dissenting opinion of Mr. Justice Jackson); e.g., *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, (1942); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935).

⁶ *Accord*, JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 85-86 (1965).

⁷ See I COOPER, STATE ADMINISTRATIVE LAW 45 (1965).

⁸ 143 U.S. 649 (1892).

⁹ *Id.* at 692. Nevertheless, in this particular case the Court upheld the grant of power to the President. *Accord*, *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932).

¹⁰ *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R.*, 282 U.S. 311, 324 (1931). See K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 203.

human foresight and specificity by legislative draftsmen if it is to succeed. To the extent there is lack of precision, the significant legal-policy authority is in the agency. It is the degree to which the agency has power to choose among alternatives that determines the extent of the legislative power transferred. The vaguer the statutory standard, the greater will be the extent of the legal-policy power vested in the agency. How specific must statutory language be to satisfy the U. S. Supreme Court?

Apparently not much specificity is needed, for the Court has sustained the following phrases as being sufficiently precise to withstand constitutional attack: "public interest,"¹¹ "public convenience, interest or necessity,"¹² and "unfair methods of competition."¹³ The vagueness of such language suggests that for all practical purposes specific legislative standards are not constitutionally necessary. Furthermore, the interdisciplinary complexity of most modern social problems probably renders creation of comprehensive and specific legislative standards extremely difficult if not impossible.¹⁴ Broad policy guidelines are about the best that may be expected.

The extent of agency power to make choices and the manner in which the power is used are of primary concern to persons subject to the power. The verbiage of the "law" (*i.e.*, statute) is of secondary concern. To the regulated, the "law" is what the agency *does* substantively and procedurally. For example, in *Federal Crop Insurance Corporation v. Merrill*,¹⁵ a group of farmers was denied recovery on government wheat insurance contracts when their wheat was destroyed by drought. The decision was based on a prohibition against government contracting for crop insurance coverage on reseeded wheat that appeared, not in the statute, but in *regulations* adopted by the Federal Crop Insurance Corporation and published in the *Federal Register*. The farmers knew nothing of the prohibitory regulations. The Court rejected their argument that the government was estopped because the County Agricultural Commission Committee, acting as agent for the Corporation, knew the wheat was reseeded.

The important point is that the "law" brought to bear on these farmers was not the statutory law (Federal Crop Insurance Act), but the legal-policy expression of an agency given power to administer the "law." The power transferred to the agency allowed it to "make law" so far as these farmers were concerned, and the Supreme Court confirmed the authority.

Practically speaking, however, the non-delegation doctrine serves as little more than window dressing, for the federal law is summarized by the Supreme Court as follows: "Delegation by Congress has long been

¹¹ *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932).

¹² *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933).

¹³ *Federal Trade Comm'n v. Gratz*, 253 U.S. 421 (1920).

¹⁴ See 1 COOPER, *supra* note 7, at 61.

¹⁵ 332 U.S. 380 (1947).

recognized as necessary in order that the exertion of legislative power does not become a futility."¹⁶

Curiously, the debate on delegation of authority has centered around legislative power. No equivalent doctrine has been developed to challenge the power of Congress to confer authority on agencies to adjudicate particular cases that arise in the administration of their programs.¹⁷ In one case¹⁸ the Supreme Court stated: "Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law."¹⁹

STATE GOVERNMENTS

Separation of Powers

As at the federal level, the constitutional purists of the states have insisted that administrative agencies are illegal attempts to combine the three branches of government in violation of the doctrine of separation of powers. They have been partially successful because the state courts are more inclined to the classical view of the doctrine than the federal courts and are not as charitable to the creation of new administrative agencies.²⁰ In a few instances the state courts have struck down legislation believed to contain an improper blending of powers.²¹ Generally speaking, however, the state courts usually manage a workable solution through decisions upholding the administrative agency as a legitimate institution of government, even though they continue to recite the classical doctrine that the powers of government must remain separated.²²

The blending of powers seems to be especially well received by the state courts where there is perceived to be a threat to the public health or safety that the state legislature seeks to meet by creating an agency and directing it to attack the problem.²³ Therefore, if a successful constitu-

¹⁶ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940); see *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22 (1951): "That a legislature may delegate to an administrative body the power to make rules and regulations and decide particular cases is one of the axioms of modern government."

¹⁷ 1 K. DAVIS, *supra* note 10, § 2.12. According to Professor Davis: "The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency. . . ."

¹⁸ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

¹⁹ *Id.* at 400.

²⁰ 1 COOPER, *supra* note 7, at 16-17 (1965).

²¹ *Id.* at 15-29. See 1 K. DAVIS, *supra* note 10, § 1.09.

²² 1 COOPER, *supra* note 7, at 25-26. *E.g.*, *Mulhearn v. Federal Shipbuilding and Dry Dock Co.*, 2 N.J. 356, 364, 66 A.2d 726 (1949).

²³ The following cases constitute a sampling of holdings from the study states that sustain administrative driver licensing programs: *Keck v. Superior Court*, 109 Cal. App. 251, 293 P. 128 (1930); *Smith v. City of Gainesville*, 93 So.2d 105 (Fla. 1957); *Tryon v. Willbank*, 234 A.D. 335, 255 N.Y.S. 27 (1932); *City of Cincinnati v. Wright*, 77 Ohio App. 261, 33 O.O. 23, 67 N.E.2d 358 (1945); *Commonwealth v. Emerick*, 373 Pa. 388, 96 A.2d 370 (1953); *Commonwealth v. Funk*, 323 Pa. 390, 186 A. 65 (1936).

tional attack is to be made on use of the "fourth branch" as an arm of government for implementation of highway safety programs, it would not likely be one based on the doctrine of separation of powers. Hence, state legal policy should emphasize the development of more sophisticated substantive and procedural controls of the "fourth branch" and should deemphasize attacks on its legitimacy.²⁴

Delegation of Power

The state courts continue to be concerned with delegation of power. They are more inclined toward the classical view that only the legislature is authorized to make legal-policy decisions and that such policy is, in fact, expressed in statutes.²⁵ Thus it is assumed that administrative agencies exist only to apply predetermined policy in a rather ministerial fashion.

In addition, some state courts persist in the sort of puristic thinking that overlooks the fact that it is virtually impossible for a legislative draftsman to anticipate every conceivable situation that might arise under a comprehensive regulatory statute. And, as distinguished from the federal courts, they accordingly seem to expect the enactment of regulatory legislation that covers virtually all situations.²⁶ They often recite the non-delegation principle and insist on more specific statutory standards than are generally required by the federal courts.²⁷ There are, however, exceptions; *e.g.*, a Texas statute describing powers of the State Board of Insurance provided simply that the Board Commissioners had power to determine when insurance company directors "are not worthy of the public confidence." This vague statutory standard was sustained by the Texas Supreme Court.²⁸

Going even further, in 1937 the Ohio Supreme Court upheld a statutory delegation of power without any statutory standards.²⁹ The court stated:

There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will In such cases, it has been held unnecessary to declare the policy of the law by establishing definite restrictions. . . . Standards restricting the Commission and directing its action are impracticable under the circumstances.³⁰

²⁴ *Accord*, JAFFE, *supra* note 6, at 85-86.

²⁵ 1 COOPER, *supra* note 7, at 45-46; 1 DAVIS, *supra* note 10, § 2.07.

²⁶ *See generally* 1 COOPER, *supra* note 7, at 46-70.

²⁷ *Id.* at 54-61.

²⁸ *Jordan v. State Bd. of Ins.*, 160 Tex. 506, 508-09 334 S.W.2d 278, 280-81 (1960). *See also* the discussion and authorities cited in 1 COOPER, *supra* note 7, at 61-70.

²⁹ *Matz v. J. L. Curtis Cartage Co.*, 132 Ohio St. 271, 7 N.E.2d 220 (1937).

³⁰ *Id.* at 281, 286, 7 N.E.2d at 225, 227. *Accord*, in *re Petersen*, 51 Cal.2d 177, 331 P.2d 24 (1953), *appeal dismissed* 360 U.S. 314 (1959); *Schierstead v. City of Brigantine*, 20 N.J. 164, 119 A.2d 5 (1955); *Matter of Barton Trucking Corp. v. O'Connell*, 7 N.Y.2d 299, 307, 197 N.Y.S.2d 138, 165 N.E.2d 163 (1959).

So far as matters of police regulation are concerned, Professor Cooper generalizes the state court attitude toward delegation as follows:

Where the Court is convinced that there exists in fact a genuine and substantial threat to the public health or safety, or the public morals, unless broad discretionary powers are vested in an administrative agency, the court will go far in sustaining delegations which might under other circumstances be held invalid.³¹

Although Professor Cooper cites several state cases holding that judicial authority cannot be delegated, he indicates that no difficulty has been encountered at the state level.³² The non-delegation question has usually involved legislative power.

In summary, it would appear that the state courts generally require more precise legislative standards than the federal courts to sustain the transfer of power. But in the public safety area (e.g., driver selection systems), the states have no difficulty in sustaining broad power transfers.

What is not often admitted candidly at the state level by attorneys, courts, and administrators is that most agencies actually have inherent in their organic statutes a base of transferred power. Few agencies act in a wholly ministerial capacity. To pretend they do is to reject reality, ignore the imprecision of statutory language, and delude oneself. The fact is that power is vested in administrative agencies at all levels of government. The role of law is to control administrative power to protect the interests of both the public and the individual.

There are those who continue to insist on putting agencies into a legal-policy straitjacket by demanding detailed legislative standards to limit agency power.³³ However, this is a self-defeating requirement that, if totally successful, destroys the legal-policy flexibility necessary for proper development of a comprehensive approach to a given social problem by the very organ of government created to attack it.³⁴ The need is not for more detailed legislation but for adequate legal controls over the necessary flexibility and discretion.

³¹ 1 COOPER, *supra* note 7, at 85-86. Of particular interest is the following statement: "While opinion is not unanimous, most state courts are willing to sustain almost any standard in delegations of power intended to permit agencies to deal effectively with matters of traffic safety. . . [cases cited]." See also the authorities cited in note 23 *supra*.

³² 1 COOPER, *supra* note 7, at 47-48, 53.

³³ This demand often travels under the banner of a request for "better laws." In the field of driver licensing it is usually echoed by those who lack legal training and those with legal training who apparently know very little about administrative law and its potential.

³⁴ 1 COOPER, *supra* note 7, at 35.

TRANSFERRED POWER

3 IN THE FIELD OF DRIVER LICENSING

If we assume that it is legally possible to transfer power to administrative agencies, to what extent has this occurred in the highway safety field—especially as to the control of human factors through driver licensing programs?

Legislation of federal and state governments in the highway safety field that (a) does not concern ascertainment and control of pertinent human factors related to motor vehicle operation and (b) does not transfer a measure of POWER to devise the legal policies that are actually brought to bear directly or indirectly on PEOPLE in driver licensing programs is not included in this analysis.¹

¹ *E.g.*, at the federal level the Bureau of Public Roads had for years participated in creating and prescribing standards of highway design and construction for federal-aid highways (initiated by the Federal Road Aid Act of 1916, 39 Stat. 355). However, its historical responsibility did not include control of human factors, and hence its operations are not to be considered. By § 3(f)(4) of the Dep't of Transp. Act, 80 Stat. 931, the Federal Highway Administrator was also made Director of Public Roads. As such he controls human factors to the extent that he exercises the authority transferred to him from the Interstate Commerce Commission to promulgate qualifications requirements of motor carrier operators. Until this transfer the Bureau had no human factors control power.

The Beamer Resolution of 1958 (P.L. 85-684, 72 Stat. 635) constituted advance Congressional consent to the creation of interstate compacts between states in the field of highway and traffic safety, including driver licensing and human factors research. However, this was essentially an enabling act to permit states to act in concert using the compact device. Congressional approval is required by the U.S. Const. art. I, § 10. No power transfer was effected by its terms.

The Roberts Act of 1964 (P.L. 88-515, 79 Stat. 578) is not included because it dealt with vehicle safety devices and not human factors. Furthermore, although it

FEDERAL GOVERNMENT

Two instances of federal government intervention that satisfy the selection criteria should be mentioned. They are (a) the power of the Civil Service Commission to prescribe standards of physical fitness and require local driver's licenses of operators of government motor vehicles and (b) the power of the Secretary of Transportation under the Highway Safety Act of 1966 to establish national uniform standards for state highway safety programs, including driver licensing standards.

The two classes may appear in the legislation that describes the agency program responsibilities.

Civilian Personnel Operating Government Vehicles for Official Purposes

In 1954 Congress enacted legislation containing the following provision:

The United States Civil Service Commission shall issue regulations to govern executive agencies in authorizing civilian personnel to operate government-owned vehicles for official purposes Such regulations shall pre-

did transfer power to the Administrator of General Services, his authority to prescribe motor vehicle safety devices was limited to vehicles purchased by GSA for government use.

The House version of the Baldwin Amendment (P.L. 89-139, 79 Stat. 578) to the Federal-Aid Highway Act of 1965 (23 U.S.C. 101 [Supp. 1967]) came close to transferring power to the Secretary of Commerce to cut off federal highway funds to states that did not have highway safety programs approved by him. However, this provision of the House bill was stripped down to a statement that state highway safety programs "should be in accordance with uniform standards approved by the Secretary" as the bill was finally passed by the Congress (23 U.S.C. 135 (1964)). Obviously, the power of the Secretary to cut off all highway funds to nonconforming states was effectively eliminated.

The National Traffic and Motor Vehicle Safety Act of 1966 (P.L. 89-563, 80 Stat. 718) is not included in this study. Although it builds on the theory of the Roberts Act and transfers power to the Secretary of Transportation to prescribe minimum motor vehicle performance standards for all motor vehicles manufactured for sale or introduced or delivered for introduction into interstate commerce in the interest of public safety, the Act does not transfer power of control over human factors.

Title IV of this Act, National Driver Register, amends the legislation of 1960 that established the Register, which lists the names of persons whose driver licenses have been denied, terminated, or temporarily withdrawn for 6 months or longer. States may or may not report names of such persons for inclusion in the list, and they may or may not avail themselves of the opportunity to have driver license applicants cleared through the Register. Participation is optional with the states. The program is described in U.S. Dept. of Transportation, *The National Driver Register* (1967).

Although there are other illustrations of federal government action in the field of highway safety, this sampling should suffice to describe the sort of intervention with which this study will *not* be concerned. To repeat, the study evaluates the sort of involvement that gives some organ of government power to devise the "law," i.e., the actual program policies that are brought to bear directly or indirectly on people subjected to that power base.

scribe standards of physical fitness for authorized operators and may require operators and prospective operators to obtain such state and local licenses or permits as would be required for the operation by them of similar vehicles for other than official purposes.²

The enactment also directed the heads of federal executive agencies to issue orders and directives necessary to comply with the regulations promulgated, including provisions for periodical testing of physical fitness and provisions regarding suspension and revocation of authorizations to operate.³ The legal-policy power base of the Civil Service Commission is described by these key phrases: "shall issue regulations," "executive agencies," "official purposes," "standards of physical fitness," and "may require . . . local licenses or permits." Apparently the Commission must issue such human factors regulations, for the mandatory "shall issue" seems to preclude any choice. The application of the regulations is limited to civilian employees of the federal government while operating government-owned vehicles for official purposes.

Less precise, but limiting the authority of the Commission, is the language that confines the Commission's human factors rule power to "standards of physical fitness" and a power of choice to require or not require a local (state) driver's license or permit.⁴ Presumably, its precision would forbid requirements as to age. In such case age controls would have to be applied indirectly by requiring a local (state) license in addition to the federal authorization. On the other hand, age could be said to be an aspect of "physical fitness."

National Uniform Standards for State Highway Safety Programs

The most extensive federal intervention in the highway safety field occurred with passage of the Motor Vehicle and Traffic Safety Act of 1966⁵ and the Highway Safety Act of 1966.⁶ The problems of safety in vehicle design and vehicle safety appliances were treated legislatively in the Motor Vehicle and Traffic Safety Act, whereas roadways and drivers were dealt with in the Highway Safety Act.

Housed in the Department of Transportation is the legislatively created National Highway Traffic Safety Administration,⁷ which has responsibility for administering the provisions of the Highway Safety Act of 1966. (Prior to December 31, 1970, the NHTSA was known as the National Highway Safety Bureau.) The Secretary of Transportation is required to carry out the provisions of the Act through the NHTSA,

² P.L. 766, 68 Stat. 1126 (1954).

³ *Id.*

⁴ *Id.*

⁵ 80 Stat. 718 (1966).

⁶ 80 Stat. 731 (1966).

⁷ Federal Aid Highway Act of 1970, P.L. 91-605, 84 Stat. 1713, approved Dec. 31, 1970, tit. II, § 201.

whose Administrator is appointed by the President with the advice and consent of the Senate.⁸ Under this Act the Secretary of Transportation does not possess direct regulatory authority over individuals, but the manner in which the statutory program is structured and the available sanctions imply that his power will affect individuals who operate motor vehicles to the same extent as direct controls.

This indirect effect on PEOPLE results from the fact that the thrust of the Secretary's power is directed at the states as political entities and not at persons. Its essence is contained in the following expression:

Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary.⁹

The primary transfer of power occurs with the granting of the authority to (a) prescribe "uniform standards" for state highway safety programs and (b) approve or disapprove state programs in terms of those standards.

The power transferred to the Secretary to promulgate uniform standards is comprehensive, for he may promulgate a standard on any subject he believes to be relevant to "safety" on highways.

Again the question is raised as to what constitutes "safety." Is this word sufficiently precise to identify a legislative goal? It is submitted that the word is not precise at all and means many things to many people. It is essentially a normative term that is defined by the administrator according to his own sense of values and his conception of how much safety restriction is compatible with efficient movement. If this analysis is correct, the administrator determines the goal of the legislation as well as the methods by which it is to be achieved. The only statutory qualification on the standards power is the requirement that the standards be "uniform." Presumably such standards will be based on empirical research of good design with appropriate controls.¹⁰

The Secretary of Transportation is also empowered to "amend or waive

⁸ *Id.*; Dep't of Transp. Act, 80 Stat. 931, § 3(f)(2) at 932.

⁹ Highway Safety Act of 1966, 80 Stat. 731, § 402(a).

¹⁰ There is abundant commentary that current highway safety "knowledge" is based on research that is nonempirical or out-of-date or both. For a sample of such commentary examine the following: H. R. Doc. No. 93, 86th Cong., 1st Sess., *THE FEDERAL ROLE IN HIGHWAY SAFETY* at 8, 121, 141, 142, 147 (1959):

Through enlargement and orderly refinement of the body of fundamental knowledge concerning high accidents will come opportunities for deeper insight, for formulation and testing of accident causes by hypothesis, and for practical development of means for safer street and highway travel.

H.R. REP. No. 1700, Highway Safety Act of 1966, 89th Cong., 2d Sess. 26 (1966); S. REP. No. 1302, Highway Safety Act of 1966, 89th Cong., 2d Sess., (1966) at 3, 6, 14, 15; *Hearings on S. 1467 Before the Subcommittee on Public Roads of the Committee on Public Works—Authorization Bill for Highway Beautification and Safety Programs*, 90th Cong., 1st Sess., at 180, 205, 328, 332, 335 (1967).

standards" on a "temporary basis" for the purpose of evaluating new or different programs instituted by one or more states on an "experimental, pilot, or demonstration basis" if the Secretary finds that such amendment or waiver would serve the "public interest."¹¹ The lack of descriptive content in such a phrase as "public interest" means the Secretary may do as he pleases with experimental, pilot, and demonstration programs without danger of running afoul of the statute. Such statutory language does not constitute an effective control of power, as was discussed earlier.¹²

In order to ensure that local [urban] highway safety programs would not suffer at the expense of the state programs, Congress provided that at least 40 percent of all federal safety funds apportioned to a state for any fiscal year would be expended by the political subdivisions of the state on such programs if the local program is approved by the governor of the state and if it is in accord with the promulgated uniform standards.¹³ However, the Secretary is given the power to waive the 40 percent requirement in whole or in part for a fiscal year for any state.¹⁴ The only control on this authority is the requirement that the Secretary determine "there is an insufficient number of local highway safety programs to justify the expenditure" of 40 percent of federal funds locally during that year.¹⁵ He alone decides how few local programs are an "insufficient number," and he alone determines what is a justified expenditure of federal funds.

Despite these broad power grants to the Secretary, the Congress did provide some effective limitations in its legislation. For example, in evaluating state highway safety programs there are certain program requirements over which the Secretary has no control and, hence, no power of choice. To be subject to approval, a program *must* (a) provide that the governor of the state is responsible for its administration; (b) authorize political subdivisions of the state to carry out local highway safety programs as part of the state program if they are approved by the governor and meet the Secretary's uniform standards; (c) provide that at least 40 percent of the federal funds received will be expended on local programs, subject to waiver of this requirement by the Secretary; (d) provide that the aggregate expenditure of state and local funds for such programs will be maintained at a level equal to the average level of such expenditures for the two fiscal years preceding enactment of the statute; and (e) provide for comprehensive driver training programs including driver education in schools, training of qualified school instructors, appropriate regulations of other driver training schools, adult driver training programs, and retraining programs for selected drivers and for development of practice driving facilities, simulators,

¹¹ 80 Stat. 731, § 402(a) (1966).

¹² See notes 11-14 ch. 2 *supra* and accompanying text.

¹³ 80 Stat. 731, § 402(b)(1)(B) (1966).

¹⁴ *Id.* § 402(b)(2).

¹⁵ *Id.*

and similar teaching aids.¹⁶ Other than these mandatory requirements the only formal controls on the Secretary's power are those discussed above.

STATE GOVERNMENTS

Until 1966 the tradition had been that highway safety was a local problem and primarily subject to local authority. Some groups contended highway safety was primarily a matter for local authority as a matter of "states' rights," and seemed to give little attention to analysis of the nature of the problem to determine how governments—state and federal—could best attack it.¹⁷ No doubt there are those who will continue to regard the 1966 federal intervention as an improper intrusion.¹⁸

This "local problem" premise was overthrown in 1966, and highway safety is now viewed as a national problem, at least by the Congress. Nonetheless, state programs will continue to be the foundation of the attack on highway deaths and injuries. Hence, state driver licensing programs are emphasized in this study.

Originally, the problems presented to the states by the motor vehicle seemed to be those of theft and identification, and to meet those needs

¹⁶ *Id.* at § 402(b)(1)(A-E).

¹⁷ *E.g.*,

It is generally agreed that achieving uniformity in traffic laws across the Nation is properly a task of the States, not the Federal government. Numerous national conferences on street and highway safety, many Federal and State officials, and informed laymen in the traffic safety field, have taken the position that centralization of highway traffic control in the Federal government is undesirable; that under our constitutional concepts, this control is primarily the responsibility of the States, and that uniform traffic regulation should have its foundation in uniform State laws. A basic tenet of the Uniform Vehicle Code is its approach through voluntary, cooperative State Action.

Foreword iv, UNIFORM VEHICLE CODE (1962); *accord*, H.R. DOC. NO. 93, THE FEDERAL ROLE IN HIGHWAY SAFETY, 86th Cong., 1st Sess. 2 (1959); statement of Lewis P. Spitz, Executive Director, American Association of Motor Vehicle Administrators, in *Hearings on S. 1467 Before the Subcommittee on Public Roads of the Committee on Public Works—Authorization Bill for Highway Beautification and Highway Safety Programs* 452 (1967).

¹⁸ See *Hearings on S. 3052 before the Subcommittee on Public Roads of the Committee on Public Works, 89th Cong., 2d Sess.* (1966) at 148-150, Statement of Charles F. Schwan, Jr., Director, Washington Office of Council of State Governments; *Hearings, supra* note 17 at 288 with reference to the implied consent standard promulgated:

The specificity of this particular standard severely limits the options available to a State legislature and practically dictates what the State legislature must do. In effect the National Highway Safety Agency is telling the state legislature what it must do in order to comply—pass implied consent legislation and also reduce blood alcohol percentage. . . . I am saying here you are limiting very much the area in which a State legislature may want to operate. . . .

Statement of David J. Allen, Administrative Assistant to the governor of Indiana. Compare at 222, Statement of John De Lorenzi, Managing Director, Public and Government Relations, American Automobile Association.

state statutes were enacted requiring the titling, registration, and licensing of the vehicles.¹⁹ However, at that time little attention was given to the human factors involved in the operation of the machine.

In some states driver licensing served originally as nothing more than a revenue-raising device, and the certificate issued was nothing more than a receipt for the payment of a licensing fee.²⁰ It is argued that the trend toward lower death rates has been due to the evolution of state driver licensing into human factors control programs that purport to assess the qualifications of an individual to operate a motor vehicle.²¹

In choosing the means to establish and implement driver licensing programs in the framework of government, state legislatures determined that the administrative agency was appropriate to the task. Whether the responsibility is that of a Department of Motor Vehicles,²² the Secretary of State,²³ the Secretary of Revenue,²⁴ or some other public agency, the approach is essentially the same in all the study states. In each the legislature has empowered the designated official, office, or agency to administer driver licensing statutes and to adjudicate the rights of individuals to obtain or retain such licenses. Judicial review of administrative decisions is generally available, either through provisions in the licensing statutes, through administrative procedure statutes, or by use of the common law prerogative writs.

Of the 10 states surveyed in this study, most driver licensing statutes contain provisions that may be classified into three categories. First, there are those statutory provisions that permit no administrative choice but impose ministerial duties on administrators. Examples include minimum age requirements,²⁵ direction to deny a license to one whose

¹⁹ See generally the series of articles by R. Donigan and E. Fisher entitled *Driver Licensing and the Law*, *TRAFFIC DIGEST AND REVIEW* (July-Oct. 1965). See also E. Fisher, *VEHICLE TRAFFIC LAW* (1961).

²⁰ Kerrick and Hennessee, *Licensing Drivers*, *TRAFFIC QUARTERLY* 401-402 (July 1961).

²¹ *Id.* at 403. *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Hough v. McCarthy*, 54 Cal. 2d 273, 353, P.2d 276 (1960); *Watson v. State Division of Motor Vehicles*, 112 Cal. 279, 298 P.481 (1931); *City of Miami v. Aronovitz*, 114 So. 2d 784 (Fla. 1959); *Thornhill v. Kirkman*, 62 So. 2d 710 (Fla. 1953); *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W. 2d 587 (1957). But see H.R. REP. No. 1700, Highway Safety Act of 1966, at 9:

The wide variation from State to State, and the failure to achieve any semblance of control or uniformity, bespeak pressures and adherence to customs long out of date. Driver licensing is apparently more a source of revenue than a safety control.

²² CAL. VEHICLE CODE, § 290 (West 1960); N.Y. VEH. & TRAF. LAW, § 200 (McKinney 1960).

²³ ILL. ANN. STAT., ch. 95½, § 1-164 (Smith-Hurd 1958); MICH. STAT. ANN. § 9.1904 (1967).

²⁴ PA. STAT. ANN. tit. 75, § 102, 607, 608 (Purdon 1960).

²⁵ CAL. VEHICLE CODE § 12512, 12805(a) (West 1960); FLA. STAT. ANN. § 322.05(1)(2) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(1) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2703 (Burns 1966); MICH. STAT. ANN. § 9.2003(1)(2) (1967); OHIO REV. CODE ANN.

license is already under suspension or has been revoked,²⁶ mandatory suspension of a license of one who has not paid a judgment entered against him that is within the terms of the state's financial responsibility laws,²⁷ and the mandatory revocation of a license upon receipt of a report of conviction of a licensee of one of several specified offenses.²⁸

The second group consists of those statutory provisions that appear to be specific and non-delegatory but that actually require interpretation and implementation and are, therefore, delegatory in nature. Typical examples include statutory denial of the license to persons classed as "habitual drunkards,"²⁹ "habitual users" of narcotics,³⁰ narcotics addicts,³¹ epileptics,³² or those who fail an examination for "eyesight"³³ or "knowledge" of the motor vehicle laws.³⁴ To make decisions involving this group, the administrative agency must establish its own judgment criteria as to which persons fall into these statutory categories, of

§ 4507.08 (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)(1) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 4(1-3) (1965).

²⁶ CAL. VEHICLE CODE § 12807 (a-b) (West 1960); FLA. STAT. ANN. § 322.05(3) (1965); ILL. ANN. STAT. ch. 95½, § 6-103(3), 6-208 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(a) (Burns 1966); MICH. STAT. ANN. § 9.2003(3) (1967); OHIO REV. CODE ANN. § 4507.08, 4507.17 (Page 1965); PA. STAT. ANN. tit. 75, § 604(a) 2, 3 621 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(4) (1965).

²⁷ CAL. VEHICLE CODE § 16370 (West 1960); FLA. STAT. ANN. § 324.121 (1965); ILL. ANN. STAT. ch. 95½, § 7-303 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1049 (Burns 1966); MICH. STAT. ANN. § 9.2212 (1967); N.J. STAT. ANN. § 332 (1961); OHIO REV. CODE ANN. § 4509.37 (Page 1965); PA. STAT. ANN. tit. 75, § 1413 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h, § 13(a) (1965).

²⁸ CAL. VEHICLE CODE § 13350 (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6-205 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967), suspension but not revocation; N.J. STAT. ANN. § 39:4-50 (1961); OHIO REV. CODE ANN. § 4507.162 (Page 1965); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 24 (1965), suspension but not revocation.

²⁹ CAL. VEHICLE CODE § 12805(b) (West 1960); FLA. STAT. ANN. § 322.05(4) (1965); ILL. ANN. STAT. ch. 95½, § 6-103(4) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(c) (Burns 1966); MICH. STAT. ANN. § 9.2003(4) (1967); OHIO REV. CODE ANN. § 4507.08(a) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a) 5 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(5) (1965).

³⁰ FLA. STAT. ANN. § 322.01(16), 322.95(4) (1965); ILL. ANN. STAT. ch. 96½, § 6-103(4) (Smith-Hurd 1958).

³¹ CAL. VEHICLE CODE § 12805(b) (West 1960); IND. ANN. STAT. § 47-2704(c) (Burns 1966); MICH. STAT. ANN. § 9.2003(4) (1967); OHIO REV. CODE ANN. § 4507.08(a) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)5 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(5) (1965).

³² CAL. VEHICLE CODE § 12805(d) (West 1960); IND. ANN. STAT. § 47-2704(d) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); PA. STAT. ANN. tit. 75, § 604(a)6 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 30 (1965).

³³ CAL. VEHICLE CODE § 12804(a) (West 1960); FLA. STAT. ANN. § 322.12 (1965); ILL. ANN. STAT. ch. 95½, § 6-109 (Smith-Hurd 1958); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 "Vision" (1965).

³⁴ CAL. VEHICLE CODE § 12805(e) (West 1960); FLA. STAT. ANN. § 322.12 (1965); N.J. STAT. ANN. § 39:3-10 (1961); OHIO REV. CODE ANN. § 4507.11 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 (1965).

what the "eyesight" examination shall consist, and what "knowledge" of the motor vehicle laws is deemed important. The statutory language is not a sufficient guide to decision, although it may be constitutionally sufficient as a legislative standard or policy. Unfortunately, motor vehicle administrators, their legal counsel, and state courts sometimes fail to recognize that a great amount of POWER is transferred to the agency by such statutory language.

Finally, there are those statutory provisions that authorize the administrator to use his judgment regarding the issuance, suspension, or revocation of a license. Examples include the power to deny a license to an applicant when there is "good cause" or "opinion" to believe that by "reason of physical or mental disability or disease" he would not be able to operate a motor vehicle with safety;³⁵ power to deny a license to anyone when the administrator has "good cause to believe" his licensing would be "inimical to public safety or welfare";³⁶ power to suspend the license of one who is "incompetent" to drive a motor vehicle;³⁷ power to suspend the license of one involved in an accident resulting in death, injury, or serious property damage;³⁸ and power to suspend the license of one who has "committed an offense" which, upon conviction, would result in mandatory revocation of the license.³⁹

The final two categories illustrate the extent of legal-policy power that resides in many licensing administrators. It is abundantly clear that driver licensing administration is not a ministerial task.

Hence, the constitutional problems are not those of separation of powers or improper delegation of power, for the state courts generally have satisfied themselves that those aspects of driver licensing statutes are constitutional. The burden of Part I, POWER, has been to demonstrate that the meaningful legal question is: Does the licensing agency

³⁵ ILL. ANN. STAT. ch. 95½, § 6-103(8) (Smith-Hurd 1968); IND. ANN. STAT. § 47-2704e (Burns 1966) ("or disease"); MICH. STAT. ANN. § 9.2003(6) (1967) ("or disease"); OHIO REV. CODE ANN. § 4507.08(c) (Page 1965) ("or disease"); PA. STAT. ANN. tit. 75, § 604(a)7 (Purdon 1960) ("or disease"); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(8) (1965) ("or disease").

³⁶ IND. ANN. STAT. § 47-2704(i) (Burns 1966); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(9) (1965).

³⁷ FLA. STAT. ANN. § 322.27(c) (1965); PA. STAT. ANN. tit. 75, § 618(a)(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(5) (1965) ("incapable").

³⁸ CAL. VEHICLE CODE § 16004 (West 1960) (failure to file an accident report); FLA. STAT. ANN. § 324.081 (1965) (accident in a foreign state); MICH. STAT. ANN. § 9.2203 (1967) (failure to file an accident report); ILL. ANN. STAT. ch. 95½, § 6-206 (Smith-Hurd 1968); IND. ANN. STAT. § 47-1046 (Burns 1966) ("any reasonable ground"); N.J. STAT. ANN. § 39:4-130 (1961) (failure to file an accident report); N.Y. VEH. & TRAF. LAW § 330; OHIO REV. CODE ANN. § 4509.06 (Page 1965) (failure to file an accident report); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960) (failure to file an accident report); TEX. REV. CIV. STAT. ANN. art. 6687b, § 39 (1965) (failure to file an accident report).

³⁹ CAL. VEHICLE CODE § 12805(b); FLA. STAT. ANN. § 322.27 (1965); ILL. ANN. STAT. ch. 95½, § 6-206 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1081(a) (Burns 1966); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(1) (1965).

exercise its transferred power in a constitutional manner, under a statutory provision that is constitutionally sound? First, the use licensing agencies make of their transferred power must be evaluated in terms of the *substantive* validity of the agency policies, rules, regulations, standards, and criteria developed in the power areas. Second, if agency policies, rules, regulations, standards, and criteria are substantively constitutional and within statutory limitations, the *procedures* by which they are brought to bear on PEOPLE who desire to operate motor vehicles must also be evaluated.

Before such substantive and procedural constitutional evaluations may be made, formal licensing rules, regulations, standards, and criteria must be identified, described, and classified, and their ability to predict future human failure must be assessed. The scientific validity of predictors used (POLICY) to make licensing decisions is of prime importance to establishing their rationality. To be constitutionally acceptable the predictors chosen (POLICY) to achieve the goal of preventing human failure through licensing must relate rationally to that goal. Licensing predictors that are not relevant to the goal do not contribute to accident prevention but serve merely to deprive PEOPLE of the right to drive. As such they are unacceptable assertions of POWER.

PART II

POLICY

INTRODUCTION TO PART II

Part I, **POWER**, suggested that the authority transferred to driver licensing officials is the power to create the substantive decision criteria and the procedures the agency uses to make driver licensing decisions. Therefore, it is by substantive and procedural policy making that licensing officials create much of the licensing program they apply to the driving public. To repeat what has already been said: It is the administrative policies that comprise the actual "law" of driver licensing and not the statutes that transfer to the agency the power to make those policies. **POLICY** is the fulcrum on which **POWER-PEOPLE** conflicts are adjusted. In short, if one desires to evaluate driver licensing systems and their administration, he must study the administrative legal-policy program and not merely the statutes that permit its creation.

Since administrative licensing decisions are not published, the primary sources of agency policies are its formal rules or regulations and agency publications containing the substantive and procedural policies that the agency has not promulgated as rules or regulations. Hence, agency staff manuals, bulletins, and guidelines are quite important to an analysis of driver licensing administration because they may be the only sources that describe the agency program accurately. Statutes, rules, and staff manuals comprise the essential material on which analysis and synthesis of driver licensing policy is based. To present the results of such an analysis and synthesis is the purpose of Part II, **POLICY**.

The text of Part II discusses both state and federal roles in driver licensing. A synthesis of state driver licensing policy processes in the study group states is presented that considers driver licensing administration to consist functionally of three elements: (a) the licensing process;

(b) withdrawal of licenses; and (c) restoration of licenses. However, the text does not represent a definitive treatment of the administrative policy of each of the study states. It is designed to synthesize administrative and legislative policies in the study group states, indicate general trends, and identify general problem areas in licensing administration.

The final chapter in Part II discusses the federal role in driver licensing, including a short summary of the involvement of the National Highway Traffic Safety Administration in the driver licensing control process. Relationships emerging between the federal government and the states as a result of federal legislation in the field of highway safety are described. Activities of federal agencies involved in licensing federal employees for official driving are not discussed.

Textural synthesis of driver licensing administration is believed to be an exposition of the primary themes in a group of states that accounts for 53 percent of the vehicle miles traveled annually and includes 54 percent of the nation's licensed drivers. Admittedly, the research is not complete, for it does not include an evaluation of informal or unknown policies. Nor does it assess the extent to which licensing agencies actually comply with their formal policy expressions. Research in the form of actual observation and interviews is necessary to provide the depth and realism desired of any comprehensive research project. However, in view of the breadth of the current project, it was not feasible to include such in-depth field research. The policy alternatives and issues discussed suggest the questions that a field researcher would ask in order to obtain the additional data needed.

4 THE CONCEPT OF DRIVER SELECTION- PREDICTION

As is well known, the highway transportation system consists of three components: the driver, the vehicle, and the road. To provide safe and efficient highway transport, government has imposed safety measures that relate to each. The function of the safety measures relevant to the driver is to prevent the sort of human failure that results in highway deaths, injuries, and property damage. The desire of government to prevent such human failure is expressed in the driver licensing programs of the states.¹ Since the goal of licensing is *prevention* of accidents, the licensing programs must be designed to *predict* the sort of human failure that results in accidents. Government has decreed that persons who may be predicted to fail as drivers should be denied admission to the driving society and that those members of the driving society who may be predicted to fail should be removed from the society.

Therefore, the primary function of driver licensing may be stated simply. Its task is to identify the applicants and licensees who will fail and either deny them admission or expel them. But to do so depends on the validity of the major premise on which driver licensing is founded. The premise is that those persons who will later become involved in accidents are identifiable. Accordingly, a corollary function of driver licensing policy is to provide the identification criteria and standards of judgment that constitute the substance of driver selection-prediction systems. However, is it realistic to assume the validity of the major premise? Are persons who will fail as drivers identifiable? May identification criteria be constructed?

¹ Of course, criminal statutes provide deterrent pressures and complement driver licensing programs.

A consensus among leading researchers appears to be that it will be difficult to implement the governmental decision to create driver selection-prediction systems that will accurately predict future driver failure.

Dr. Leon Goldstein, now with the National Transportation Safety Board, demonstrated the general problems inherent in driver selection-prediction in a 1963 presentation to the National Safety Congress.² He described the ingredients of a selection system to include:

First, a situation in which there are more applicants than vacancies that must be filled; second, a clearly specified criterion (with sufficient stability and preferably quantified); and third, predictor measures that have some relationship to the criterion of interest.³

The first ingredient is introduced into the initial phase of the licensing system by establishing predetermined exclusion policies and license examination cutoff scores that must be met by applicants. It is introduced into the license withdrawal phase by the adoption of predetermined expulsion policies and governmental evaluation of driving performance as reflected by traffic offense conviction reports, accident reports, and other information that comes to its attention. At first glance, it may appear that driver licensing does not involve selection because no formal limit is imposed on the size of the licensed group. Theoretically, all applicants might be accepted. Nevertheless, although driver licensing administrators do not begin their screening of initial license applicants or licensee deviants with a predetermined quota of admissions or withdrawals, the predetermined policies, cutoff scores, and performance evaluations will have the same effect, because some initial applicants are rejected and some licenses withdrawn. Hence, an artificial excess of initial applicants (or licensees) to vacancies (or withdrawals) is created.

The second ingredient—a specific performance criterion—is also part of driver licensing systems and it can be quantified. It is, however, subject to the criticism that it is not stable and is, therefore, not highly predictable. The specific criterion of performance sought by driver licensing policy is *accident-free driving by licensees*. This is readily quantified as zero accidents. But, as Goldstein points out, a study of 29,000 drivers over two 3-year periods showed that 82 percent of those drivers who had accidents during the first period were completely free of accidents during the second period. Of those who were accident-free during the first period, only 9 percent had accidents during the second period. Accident status in one time period is not highly related to status in another time period.⁴ Likewise, a California study of the records of

² L. GOLDSTEIN, *Driver Selection—The Lure, Logic and Logistics*, TRANSACTIONS, NATIONAL SAFETY CONGRESS (1963).

³ *Id.* at 3.

⁴ *Id.* at 6. See also M. BLUMENTHAL, *Dimensions of the Traffic Safety Problem* 12 TRAFFIC SAFETY RESEARCH REVIEW 7 (1968).

95,000 drivers over a 3-year period showed more than 86 percent were completely accident-free regardless of the number of moving traffic violations on their records. It further demonstrated that more than 50 percent of the drivers with the worst records of moving violations (nine or more) were, nonetheless, totally free of accident involvement.⁵ These findings show the instability of individual accident status or rate and the fact that the overwhelming majority of drivers are accident-free regardless of their driving performance. It is this combination of instability and low incidence of accidents among those who might be expected to have them that makes accident-free driving a difficult performance criterion to predict.

The third ingredient—valid predictors—is too often glibly assumed to be included in driver licensing systems. Many legislators, motor vehicle administrators, lawyers, and judges appear to believe that most current licensing decision criteria and standards are valid predictors of human failure despite the fact that their validity has not been established by empirical research. This assumption leads them to make demands for strict enforcement, crackdowns on violators, and mandatory jail sentences. Goldstein contends that many of the predictors used in driver licensing only *slightly* predict the performance criterion of accident-free driving; hence, they are of low validity.⁶

The importance of predictor validity may hardly be overstated, for if the predictor-to-performance criterion relationship is zero, that particular predictor is of no value in the driver selection-prediction process. It does not matter how "strict" the administration, how tough the "crackdown," how high the cutoff scores, how long the jail sentence, or how few points are to be required before license withdrawal—nothing will serve to make effective a predictor-to-performance relationship of zero.⁷ Where a zero relationship exists, new predictors must be devised and substituted if the selection-prediction system is to have any chance of success in achieving the performance criterion of *accident-free driving by licensees*. In short, the greater the predictor-to-performance criterion ratio, the higher is the validity of the predictor.

Goldstein concludes: "Accident rate for individuals is not a highly predictable criterion. Validities of the best predictors of accident involvement are so low that it takes an extremely favorable selection ratio to make selection worthwhile at all."⁸

Thus, the unstable performance criterion and the low-validity predictors combine to demand compensation somewhere in the driver selection-prediction process. That compensation may be made by ma-

⁵ *Id.* at 7-8.

⁶ *Id.* at 8. According to Goldstein, a validity correlation of 0.26 is about the best obtainable for any licensing predictor. *Accord*, Versace in ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM 37 (1967).

⁷ *Id.* at 5.

⁸ *Id.* at 6-7.

nipulating the selection-prediction process. Goldstein says driver selection systems may be made efficient *only* by utilizing "an extremely favorable selection ratio."⁹ If such a favorable selection ratio cannot be used, the system is not worthwhile because it is too inefficient. What is a "selection ratio?" What is an "extremely favorable" selection ratio? May one be incorporated into driver selection-prediction systems? Is Goldstein correct in saying that current driver selection predictors are, indeed, of low validity?

By "selection ratio" Goldstein means the number of applicants (or licensees) that will be admitted (or expelled) to (or from) the driving society compared to the total number of applicants (or licensees) in the group. If only a few of the group are to be admitted (or expelled), the selection may be made with confidence despite an unstable criterion and low-validity predictors. The small number of persons to be identified permits the raising of cutoff scores to accept only the fully satisfactory applicants and expel only the completely unsatisfactory deviant licensees. The key to making driver selection-prediction systems is, therefore, an "extremely favorable" selection ratio. The smaller the selection ratio, the greater is the likelihood of successful prediction.¹⁰

Therefore, according to Goldstein, driver selection-prediction systems are based on low-validity predictors that must be used to identify *very few* applicants or licensees if the system is to accomplish its goal of preventing the sort of human failure that leads to accidents. Assuming that Goldstein is correct, is it possible to structure such a favorable selection ratio into driver licensing systems to compensate for the low-validity predictors?

Because of the importance of motor vehicles in our highly mobile society, it is doubtful that a "highly favorable" small selection ratio would be tolerated. It is at this point that the irrational factors of human desire and political pressure combine in the legal policy process to inhibit the efficiency of the driver selection-prediction system by preventing the compensation necessary to ensure its success. Thus, socio-political factors may prevail over empirical-statistical research in the legal-policy decision. If the test of legal policy is efficiency, driver selection-prediction policy could be termed irrational. However, it is not uncommon to find similar sacrifices of efficiency to social expediency in American government. Legally, this sacrifice is termed a protection of individual liberty. Representative democracy has always been subject to the criticism that it is inefficient. The sacrifice of efficiency is quite acceptable when it can be shown, for instance, that, of the California drivers who had the worst driver performance records as measured by moving traffic violations, more than 50 percent were free of accidents for a 3-year period. A "highly favorable" small selection ratio would serve

⁹ *Id.* at 5.

¹⁰ Of course, if more valid licensing predictors can be developed, the selection ratio can be larger and the same level of successful prediction maintained.

to eliminate too many *socially* acceptable drivers from the highways for no *socially* justifiable reason. The point is that it is not politically acceptable for government to deny or withdraw too many licenses. To repeat, this sacrifice is termed protection of individual liberty. By its "liberty"-oriented decision, government adopts an inefficient driver selection system that admits some who will become involved in accidents and does not expel some who will become involved in accidents. The net result is obvious. The design of current driver selection-prediction systems is such that they assume an irreducible minimum number of accidents that result from human failure. But perhaps the Goldstein premises are incorrect. Perhaps it may be shown that accident-free driving is a stable criterion and that current predictors are of high validity. What do other researchers have to say?

Age is a licensing predictor used by all states. The basic minimum age limit for unlimited licensing ranges between 16 and 21¹¹ in the study group states. Goldstein states that studies have shown that drivers under age 25 and over age 65 have disproportionately high accident rates.¹² If this is so, is age really a low-validity predictor as he suggests? Perhaps the single predictor of age is sufficient! The value of age as a predictor and the import of the single predictor approach to driver selection it suggests is summarized by three other researchers as follows:

There has been a continuing effort to eliminate individuals on the basis of single factors such as age, intelligence, motor skills, sensory capacities and physical incapacity. Although in the case of some factors, gross relationships with accidents have been demonstrated to exist, they are not refined enough to be of practical value. Cutting scores set high enough to induce a majority of possible accident risks would eliminate too many individuals who should not be included on such a basis.¹³

Even so, given the fact that there is a *gross* relationship, perhaps refinements could be made within the age extremes to provide more valid predictions. Perhaps legislators, judges, lawyers, and administrators are

¹¹ Several states permit licensing at an earlier age than 21 with parental consent.

¹² Goldstein, *supra* note 2, at 13, citing L. Goldstein, Research on Human Variables in Safe Motor Vehicle Operation: A Correlational Summary of Predictor Variables and Criterion Measures, The Driver Behavior Research Project, The George Washington University, Washington, D.C., June 1961; A. Lauer, *Age and Sex in Relation to Accidents*, HIGHWAY RESEARCH BOARD BULLETIN 60 at 25 (1952); W. Tillman, The Psychiatric and Social Approach to the Detection of Accident Prone Drivers, M.S. thesis, University of Western Ontario, London, 1948; U.S. CONGRESS, MOTOR VEHICLE TRAFFIC CONDITIONS IN THE UNITED STATES, THE ACCIDENT PRONE DRIVER, H.R. DOC. No. 462, Part VI, 75th Cong., 3d Sess. (1938). *But see* S. FINESILVER, THE OLDER DRIVER—A STATISTICAL EVALUATION OF LICENSING AND ACCIDENT INVOLVEMENT IN THIRTY STATES (1969). The Finesilver study is not adjusted for exposure rate on a time or miles-traveled basis.

¹³ F. FREEMAN, C. GOSHEN, B. KING, THE ROLE OF HUMAN FACTORS IN ACCIDENT PREVENTION 54 (1960).

correct when they demand that the basic age limit be raised to keep the younger teen-age drivers off the highways. Let us assume the age predictor is changed from 16 to 18. Surely, they assert, there will be fewer accidents because of the greater maturity.

Unfortunately, a recent California study of the driving records of 10,000 teen-age drivers concluded:

In terms of absolute risk, the authors can find no evidence to support a raise in the minimum licensing age in California. In terms of relative risk, however, there is some evidence, for males, that younger drivers are more predisposed to accidents than drivers in their older teens. Any final decision concerning a raise in licensing age must be based upon the relative merits of these two methods of comparison.¹⁴

The authors of the study state that they believe the absolute risk factor to be the most relevant criterion for evaluating the present licensing age requirement.¹⁵

Ignoring this study, the California legislature raised the basic age limit from 16 to 18, effective July 1, 1967. But it also provided for issue of a minor's license between the ages of 16 and 18 upon completion of a driver education course or 6 hours of formal driving instruction.¹⁶

Other predictors for driver licensing are subject to similar criticisms. The current consensus among researchers seems to be that there are some predictors that show promise and should be studied further, refined, and validated if possible. Other predictors of some validity include prior accident involvement;¹⁷ the extremes of emotional and attitudinal factors such as instability, excitability, and aggression;¹⁸ irresponsible use of alcohol;¹⁹ and background and sociological factors including bad debts, other criminal violations, and irresponsibility.²⁰ But, with the exception of alcohol use, on the basis of current knowledge their utility is limited because their validity is, indeed, low. Alcohol use is a relatively valid predictor of accident involvement.²¹

If empirical research can provide a quantified job description of the driving task, high-validity predictors may then be devised. With high-validity predictors an unfavorable (large) selection ratio may be used effectively. Even so, it may be difficult to obtain a sociopolitical policy decision to use the more valid predictors discovered. A predictor of 60

¹⁴ STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, *THE TEEN-AGED DRIVER* 23 (1965).

¹⁵ *Id.* at 9.

¹⁶ CAL. VEHICLE CODE §§ 12507, 12512 (West 1960).

¹⁷ See Goldstein *supra* note 2, at 11 and references therein cited. But see H. ROSS, *A Review Article on Basic Protection for the Accident Victim*, 34 *THE JOURNAL OF RISK AND INSURANCE* 647, 649 (1967).

¹⁸ Goldstein, *supra* note 2, at 12.

¹⁹ *Id.* at 13.

²⁰ *Id.* at 12.

²¹ A. LITTLE, INC., *THE STATE OF THE ART OF TRAFFIC SAFETY* 95-96 (1966).

percent validity will also eliminate 40 percent who would not become involved in accidents, regardless of the favorability or unfavorability of the selection ratio used. The sociopolitical question here is whether the predictor is worth using if it eliminates 40 percent who are acceptable and deprives them of their liberty of mobility.

The blunt truth is that at present it is not known what the driving task involves. This is apparent from comments of researchers concerning the use of medical predictors for driver selection-prediction. It has been said, for instance:

Unless one knows those factors which make up the complex series of sensory perceptions, their sorting and evaluating, and the myriad responses which are labeled loosely "driving skill," how can one understand the degree of alteration due to the taking of a drug, the emotional status of the driver, or the effect of a particular disease?²²

A recurring theme at the 1964 National Conference on Medical Aspects of Driver Safety and Driver Licensing was that ". . . at the present time there are very few well-established facts to translate into administrative decisions for action."²³

Two other participants had a similar viewpoint: "Present criteria for driving are largely based on opinion. More data should be obtained in order that we may better relate specific medical deficiencies to records of driving, to establish criteria which we can all agree on for evaluating drivers' fitness."²⁴

Dr. Ross McFarland of the Harvard University School of Public Health commented:

Furthermore, until very recently, no empirical findings have been reported which indicate that persons suffering from any disease, with the exception of alcoholism, have higher accident rates than persons free from disease As yet, there is no reliable information on how frequently illness or physical defects cause or contribute to accidents, and there is no way of estimating how many accidents might be prevented through the adoption of a particular standard.²⁵

As to the quality of most of the research in the field, it was said:

An analysis of the research literature on highway accidents suggests that, in general, it may be characterized as being very superficial, involving a lack of sophistication and scientific rigor. There are some studies, of course, which are wholly acceptable by the usual scientific criteria, but these are exceptions Much of the research on accidents has been

²² Mirkin, in U.S. DEPT. OF HEALTH, EDUC. AND WELFARE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON MEDICAL ASPECTS OF DRIVER SAFETY AND DRIVER LICENSING 4 (1964).

²³ McFarland, PROCEEDINGS *supra* note 22, at 40. *Id.* Wheatley at 43.

²⁴ Erickson, Waller, PROCEEDINGS *supra* note 22, at 31.

²⁵ McFarland, PROCEEDINGS, *supra* note 22, at 50.

carried out by dedicated workers whose training has not acquainted them adequately with these requirements.²⁶

The same conclusion was reached by Dr. William Haddon, former Administrator of the National Highway Safety Bureau.²⁷

Yet another author points out: "Without either a specialty of driver medicine or its supportive driver medicine research, there has not arisen a specific body of factual knowledge on which can be based either regulations and controls or a physician's decision to ground a driver, whether temporarily or permanently."²⁸

Chronic alcoholism is one disease that research has demonstrated bears a close relationship to driver failure. Studies conclude that the alcoholic should not be licensed, not only because he is likely to be intoxicated but also because alcoholism is accompanied by brain damage and progressive deterioration of mental functions, rendering alcoholics unacceptable risks even while sober.²⁹ Furthermore, because of his illness, the alcoholic ignores slogans and threats of punishment designed to act as deterrents to mixing alcohol and driving.³⁰ This combination of factors is said to warrant total disqualification.

Outside the area of chronic alcoholism, however, there is reason to question the common assumption that the serious drunk driving risk is the ordinary person who simply drinks too much on occasion.³¹ Some researchers suggest drinking control measures may concentrate on the chronic alcoholic.³²

At this point it is important to remember that to set predictor cutoff scores high enough to eliminate the real risks in a broad, single-factor classification is to reject many acceptable risks because of the low validity of the predictor. Recall that a 60 percent valid predictor also identifies 40 percent who will not fail. Sociopolitical pressures will not permit use of a "highly favorable" small selection ratio to offset low-validity predictors because of the importance of the automobile in American life. Neither will they permit the use of high-validity predictors that eliminate a respectable minority who will not become involved in accidents.

Descriptions of the current state of knowledge such as those men-

²⁶ *Id.* at 44. To the same effect, see the comments of B. Campbell in ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, *TRAFFIC SAFETY—A NATIONAL PROBLEM* 9-10 (1967).

²⁷ W. HADDON, E. SUCHMAN, D. KLEIN, *ACCIDENT RESEARCH: METHODS AND APPROACHES* 30 (1964); Haddon, *TRAFFIC SAFETY* *supra* note 26, at 6.

²⁸ A. Lawton, 64 *TRAFFIC SAFETY* 13 (1964).

²⁹ W. Schmidt and R. Smart, *Drinking-Driving Mortality and Morbidity Statistics*, in *ALCOHOL AND TRAFFIC SAFETY* 39-42 (Fox and Fox ed. 1963); Vester, *Alcohol Ingestion and Traffic Accidents—Some Biochemical Considerations*, *ALCOHOL AND TRAFFIC SAFETY* 123-25 (1963).

³⁰ Schmidt and Smart, *supra* note 29, at 41-42.

³¹ *Id.* at 39-40. Haddon in *TRAFFIC SAFETY*, *supra* note 26, at 13. See also J. Waller in 4th International Conference on Alcohol and Traffic Safety, Dec. 6-10, 1965 (Indiana University).

³² Schmidt and Smart, *supra* note 29, at 41-42; Haddon *supra* note 26, at 13; Waller, *supra* note 31.

tioned above should prove startling to legislators, judges, motor vehicle administrators, and lawyers who have assumed our driver selection-prediction criteria are, in fact, an efficient means by which to identify persons who will fail as drivers. To continue to impose current driver selection-prediction criteria on the public blindly and in the name of "highway safety" is to raise the knotty question, How does government justify its refusals and withdrawals of licenses on such a faulty basis? Based on opinion and guesswork not verified empirically, but nevertheless *assumed* to predict future driving failure, of what service to society are "folklore" driver selection-prediction criteria?

The significance of what has been said is that government must accept the fact that current driver selection-prediction systems, even if rigorously enforced, *will not* necessarily produce lower accident rates by reason of prevention of human failure, although they *will* deny many persons the use of the highways. If law, both statutory and administrative, is to serve adequately as a means of social control of drivers in the interest of highway safety, it must build on empirical foundations.

This does not mean that government should abandon driver licensing control efforts until it is certain of the proper policies to adopt. But it implies that government must be careful to avoid the temptation of becoming overzealous in enforcing the policies currently in use on the mere assumption that strict enforcement and driver crackdowns will save lives.³³ Hence, abandonment of driver licensing is not to be expected, nor is it desired. Legal policy does not require empirical research support to be enforceable, and educated guesses are common to legal policy decisions. To the extent licensing policy guesses and opinions are in error, however, it may be assumed that the effectiveness of driver selection-prediction programs will continue to fall short of the mark. Presumably government will continue its present feeble attempts until empirical research verifies existing policies or suggests other directions and techniques by which driver behavior may be more efficiently predicted and controlled.

Government policy makers must not refuse to recognize candidly the "folklore" basis of existing licensing systems and must allow for the possibility that license denials and withdrawals based on opinion-and-guess predictors may be socially unacceptable. This means the applicant or licensee may justifiably demand more consideration for *his* point of view by persons implementing driver licensing systems. Having no real assurance their statutes and their policies are effective in predicting which humans fail as drivers, administrators must be cautious when deliberating denial or withdrawal of a license.

³³ E.g., H. Ross and D. Campbell, *The Connecticut Speed Crackdown: A Study of the Effects of Legal Change*, in PERSPECTIVES ON THE SOCIAL ORDER 30, 33 (H. Ross ed. 1968):

It thus seems quite likely that the high [death rate] figures of 1955 caused the crackdown, and thus less likely that the crackdown caused the low figures of 1956, for a drop would have been predicted on grounds of regression in any case.

THE LICENSING PROCESS: 5 INTRODUCTION AND EXEMPTIONS

INTRODUCTION TO THE LICENSING PROCESS

All 10 study states have established driver selection-prediction systems that require a license permitting the operation of a motor vehicle on a "highway."¹

The substance of state licensing programs consists of the selection predictors established by legislature or by agency. Those established by the legislature appear, of course, as statutes, whereas agency predictors may appear in rules and regulations, staff manual statements, guidelines, or bulletins. The legislative and administrative predictors may also be described as legal policy expressions or "laws." Hence, legislatures *and* agencies establish driver selection predictors and "make laws" simultaneously. It is these legal policy driver selection predictors that are to be evaluated, for they represent the substantive criteria of judgment applied in the administration of the programs.

The selection ratio is an equally important part of driver licensing programs, and it, too, is expressed as "law" or legal policy. By establishing a limited number of exclusion and expulsion predictors that obviously apply to very few people, state statutes broadly imply a basic

¹ CAL. VEHICLE CODE §§ 12500, 14605 (West 1960); FLA. STAT. ANN. § 322.03 (1965); ILL. ANN. STAT. ch. 95½, § 6A-101 (a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2701 (Burns 1966); MICH. STAT. ANN. § 9.200001 (1967); N.J. STAT. ANN. § 39:3-10 (1961); N.Y. VEH. & TRAF. § 501 (4)a (McKinney 1960); OHIO REV. CODE ANN. § 4507.02 (Page 1965); PA. STAT. ANN. tit. 75, § 601 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 2a (1965). However, two require licenses for the operation of motor vehicles in off-street parking facilities, supermarket parking lots, and car wash establishments: CAL. VEHICLE CODE §§ 12500, 14605 (West 1960); N.Y. VEH. & TRAF. § 501 (4)a (McKinney 1960).

entitlement to a driver's license. However, some statutes do seem to say licenses are issued purely at the discretion of the administrator.² Whichever the case may be, the fact of the matter is that, in all the study states, driver selection systems assume individuals are entitled to license status unless shown to be disqualified by exclusion or expulsion predictors.

Hence, the ratio of selection is of necessity "unfavorable" to accurate prediction, for legal policy requires it to be large in relation to the size of the group to be evaluated. Licensing administrators, police, and courts are not justified in proclaiming they have a legislative mandate that emphasizes denial of licenses to applicants and the removal of licensees from the highways in the interest of public safety. Such negativism is misdirected and ill-informed. If they persist in stressing license denial and removal and act accordingly, their authority is at its lowest ebb, for they act in disregard of legislative recognition of the social need to drive a motor vehicle.³ Legislative concern for the individual interest in motor vehicle operation is inherent in the driver licensing programs they administer.

Licensing officials do not ask *why* the applicant wants a license or *why* a licensee wants to retain a license. Nor do they ask whether highway conditions justify admission of additional licensees or require the elimination of some licensees. In fact, they probably have no legal authority to do so. For example, no state studied requires or even makes provision for an advance hearing on the question of whether it is desirable that a license be issued. If the applicant meets the predictor requirements, he will be licensed. On the contrary, opportunity for an administrative hearing after a decision has been made to deny the license is often provided by statute.⁴ The desire to obtain or retain licensee status for the sole reason that one wants to drive is legally sufficient. No statutory authority has been found that authorizes exclusion from or expulsion from license status unless the predictor policies apply. Consequently, for most people, obtaining a license and renewing it periodically are routine tasks.

Thus, issues of public need and desirability do not arise in driver licensing as they do in liquor licensing, for example. Driver licensing is more akin to admission to law practice. Both use a prediction system that admits many more applicants than it excludes, and once the status is obtained it is not often withdrawn.

After the selection-prediction process has determined that an original applicant is to be accepted, the decision is recorded, and a certificate or card is issued as evidence of that decision. Concurrently, the state estab-

² N.J. STAT. ANN. § 39:3-10 (1961); N.Y. VEH. & TRAF. § 501 (1) (a) (McKinney 1960).

³ Some states formally permit hardship licensing of persons not otherwise eligible, or who would otherwise be expelled. See discussion ch. 13, *infra*.

⁴ E.g., CAL. VEHICLE CODE § 13951 (West 1960); ILL. ANN. STAT. ch. 95½, § 2-117(a) (Smith-Hurd 1958); MICH. STAT. ANN. § 9.2022 (1967); N.J. STAT. ANN. § 39:5-30 (1961); OHIO REV. CODE ANN. § 4507.08 (c) (1) (Page 1965).

lishes a permanent, individual record for the new licensee. To the layman, it is this card that is his driver's license, rather than the selection decision represented by the card. The card must be carried by the licensee when he operates a motor vehicle,⁵ must be exhibited upon proper demand by law enforcement officers and judges,⁶ and, if it is lost or destroyed, a duplicate must be obtained.⁷

LICENSE EXEMPTIONS

Despite statutes requiring licenses, certain drivers may not be subject to the selection-prediction system of a particular state. The principal exemption classes include U. S. officers and employees, operators of agricultural equipment and special machinery, and nonresidents.

Eight of the states studied exempt U.S. officials on government business from licensing by statute. The New Jersey and New York statutes are silent, those states apparently preferring to leave the matter of exemption policy making to licensing administrators.

The temporary or incidental operation, without a license, of special equipment such as farm tractors, implements of husbandry, well-drilling equipment, and road rollers is permitted by statute in nine of the study states.⁸ New Jersey has no statute, preferring instead to leave the policy making to administrative officials.

Licensees are also permitted to drive in other states without securing licenses in the states visited. Although such operation is in interstate commerce, the U.S. Supreme Court cases indicate no constitutional barrier to state regulation in the absence of federal preemption of the field.⁹ States have decided that, as a matter of courtesy, they will not

⁵ CAL. VEHICLE CODE § 12951 (West 1960); FLA. STAT. ANN. § 322.15 (1965); ILL. ANN. STAT. ch. 95½, § 6A-118 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2714(b) (Burns 1966); MICH. STAT. ANN. § 9.2011 (1967); N.J. STAT. ANN. § 39:3-29 (1961); N.Y. VEH. & TRAF. § 501(1)e (McKinney 1960); OHIO REV. CODE ANN. § 4507.35 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (1965).

⁶ CAL. VEHICLE CODE § 12951 (West 1960); FLA. STAT. ANN. § 322.15 (1965); ILL. ANN. STAT. ch. 95½, § 6A-118 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2714(b) (Burns 1966); MICH. STAT. ANN. § 9.2011 (1967); N.J. STAT. ANN. § 39:3-29 (1961); N.Y. VEH. & TRAF. § 501(1)e (McKinney 1960); OHIO REV. CODE ANN. § 4507.35 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 13 (1965).

⁷ FLA. STAT. ANN. §§ 322.17, 322.19 (1965); ILL. ANN. STAT. ch. 95½, § 6A-120 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2713 (Burns 1966); MICH. STAT. ANN. § 9.2013 (1967); N.J. STAT. ANN. § 39:3-31 (1961); N.Y. VEH. & TRAF. § 501(1)g (McKinney 1960); PA. STAT. ANN. tit. 75, § 613 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 14 (1965).

⁸ CAL. VEHICLE CODE § 12501(b) (West 1960); FLA. STAT. ANN. § 322.04(2) (1965); ILL. ANN. STAT. ch. 95½, § 6A-102(5) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2702(2) (Burns 1966); MICH. STAT. ANN. § 9.2002(2) (1967); N.Y. VEH. & TRAF. § 501(4)d (McKinney 1960); OHIO REV. CODE ANN. § 4507.03 (Page 1965); PA. STAT. ANN. tit. 75, § 602 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 3(2) (1965).

⁹ Hendrick v. Maryland, 235 U.S. 610 (1915); Hess v. Pawlowski, 274 U.S. 352 (1927); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938);

impose the full panoply of licensing requirements to licensees from sister states. The decision to extend this courtesy has the effect of placing reliance on the driver selection-prediction system of the sister state. To the extent the licensing program of the foreign state is more accurate or less accurate in its predictions than that of the visited state, the potential for human failure will vary accordingly.

SUMMARY

The doctrine of sovereign immunity, the disregard of highway danger presented by temporary operation of special equipment, and the courtesy extended licensees from other states serve to insulate some drivers from the selection-prediction system of the state in which the driving occurs. Are these drivers subjected to other selection controls, or do they escape control entirely? In most instances total lack of control is probably avoided, for most drivers may be expected to be licensed by some state. In addition, the federal agency by which a driver is employed may have established its own controls.¹⁰ Even so, questions arise as to the quality of other state programs and the federal employee programs, for they may be deficient in several respects. Research should be conducted to ascertain the percentage relationship that driving by completely immunized drivers bears to total vehicle miles traveled. If the percentage is significant, action should be taken to subject these drivers to controls somewhere in government. Such research was beyond the scope of this project, but the results would be relevant and should be considered if made available.

States can do nothing about sovereign immunity, but they could apply control policies of some sort to the operation of agricultural and special equipment on their highways. The practice of states to extend interstate licensee courtesy is probably a permanent policy because of the large volume of interstate travel. But the National Highway Traffic Safety Administration should act decisively to create and establish a national driver prediction-selection model for all the states. The states have resisted uniformity for many years and cannot be relied on to accomplish the task. The Driver License Compact¹¹ is only a piecemeal step toward uniformity, for it does not constitute a complete selection-prediction system model, and many states have not become parties to the Compact. It is a futile gesture at uniformity, not only because it is

Maurer v. Hamilton, 309 U.S. 598 (1940); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

¹⁰ P.L. 766, 68 Stat. 1126 (1954) "(j) The United States Civil Service Commission shall issue regulations to govern executive agencies in authorizing civilian personnel to operate Government-owned Motor Vehicles. . . . The head of each executive agency shall issue such orders and directives as may be necessary. . . ." *Id.* at 1128.

¹¹ The Compact was created by a group of states, based on the Beamer Resolution of 1958, P.L. 85-684 72 Stat. 635, which gave Congressional consent to interstate compacts in the field of highway safety.

incomplete, but also because its success depends on the voluntary agreement of all 50 states. States have had the opportunity to establish uniformity by adopting the licensing provisions of the Uniform Vehicle Code,¹² for example, but they have failed to do so.

In the study states driver exemption legislation is relatively precise, and hence administrators apply policy and do not create it for the most part. But agency rule-making power could be used to clarify some provisions. For example, an agency rule could define what is meant by "temporarily" or "incidentally" operating agricultural or special equipment, to prevent abuses of the exemption privilege. Agency rules could likewise define what is meant by "accepting general employment" in a state, which may result in loss of exemption status. Rules could also give precision to a broad reciprocity statute.

Contrary to the common assumption, legislative action is not necessary in all policy-making circumstances. If agencies ascertain the extent of their transferred power and use it, they may discover that a new statutory policy is not always needed. Transferred power permits them to act creatively to establish needed policies. Naturally, this will occur only if the agency desires to be creative and is not afraid to act. In the sociopolitical world of government it is much more comfortable to emphasize production responsibilities over policy-making responsibilities, for creative policy making is difficult, time-consuming, and may lead to political repercussions. Hence, it may be deemed discreet to seek a legislative change rather than establish policy administratively.

¹² The *Uniform Vehicle Code* is prepared and recommended to the states by the National Committee on Uniform Traffic Laws and Ordinances, Washington, D. C.

THE LICENSING PROCESS: TYPES OF 6 PREDICTOR POLICIES AND EXCLUSIONS

TYPES OF LICENSING SELECTOR-PREDICTORS

The predictor policies that constitute the criteria of judgment of licensing systems may be described in at least three ways. First, they may be classified as single- or multiple-factor predictors. Driver licensing selection systems have always used a group of single-factor predictors. The fact that they are single-factor lends to their low validity because, when human characteristics are isolated and related to accident-causing behavior, only gross relationships can be shown.¹ Nonetheless, single-factor predictor policies continue to be used in driver licensing.

Second, predictor policies may be described according to whether they attempt to predict acceptable behavior or unacceptable behavior. Driver licensing predictors are chosen to predict future misbehavior while driving. They are, therefore, negatively oriented and attempt to identify people who should be denied or removed from license status. But, to repeat what was suggested earlier, the fact that licensing predictors predict the "outs" and not the "ins" does not support the contention that a state has adopted a negative attitude toward driver licensing in general. The predictors used in a selection system may be either positive or negative. By using a group of single-factor predictor policies designed to identify only the unacceptable driver, it is apparent that most people are, by legal policy design, expected to be granted license status.

A third category of predictor policies may emphasize their function as

¹F. FREEMAN, C. GOSHEN, B. KING, THE ROLE OF HUMAN FACTORS IN ACCIDENT PREVENTION 54 (1960).

legal policies rather than their function as predictors of human failure. This classification organizes them according to the organ of government where they are made and evaluates them in legal terms instead of scientific terms. This type of classification aids in the identification of the predictor actually applied in the system, for it requires a search for a specific legal policy and not some general expression of "law." Find the specific legal policy and you will also find the specific licensing predictor. Hence, the term "predictor policy" is used throughout this study. It serves as a reminder of the dual functions performed by driver selection criteria. The predictor policies relevant to driver selection may be created by the Congress; the NHTSA; the state legislatures; state motor vehicle administrators; and, in some instances, state courts. Identification and evaluation of licensing predictor policies emanating from these power sources are primary to this study of driver licensing administration.

LICENSE EXCLUSIONS

Although some drivers are not subject to prediction systems in certain circumstances, the vast majority are. When persons initially seek license status, they confront a set of predictor policy barriers at the outset. If these predictor policies apply, the license is denied without further processing. No examination or driving test need be administered, for no license will issue in any event.

All the study states have adopted predictor policies that forbid issuing a license to those initial applicants to whom the predictor policies relate. Some are made by legislative bodies, for they appear as statutes that are sufficiently precise to permit their ministerial application by the administrator. Others are agency-created, appear as rules and regulations, and arise out of imprecise statutes that must be made specific if they are to be implemented. A third group is agency-created, appears as rules, and arises out of broad statutory power transfers.

Statutory Exclusion Policies

Examples of legislative predictor policies denying the license are those that establish minimum age limits;² require denial to persons already under license suspension or revocation;³ require denial unless licenses

² CAL. VEHICLE CODE §§ 12512, 12805(a) (West 1960); FLA. STAT. ANN. § 322.05(1) (2) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(1) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2703 (Burns 1966); MICH. STAT. ANN. § 912003(1)(2) (1967); N.J. STAT. ANN. § 39:3-10 (1961); N.Y. VEH. & TRAF. § 501(1)b (McKinney 1960); OHIO REV. CODE ANN. § 4507.08 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(1) (1965).

³ CAL. VEHICLE CODE § 12807(a)(b) (West 1960); FLA. STAT. ANN. § 322.05(3) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(3), 6-208 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(a) (Burns 1966); MICH. STAT. ANN. § 9.2003(3) (1967); OHIO REV. CODE ANN. § 4507.17 (Page 1965); PA. STAT. ANN. tit. 75, § 604(a) 2,3 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 4(4) (1965).

issued by foreign jurisdictions are surrendered;⁴ require denial to persons adjudged to be epileptic,⁵ insane, idiot, or imbecile and who have not been restored to competency by judicial decree;⁶ require denial to those who have applied for or receive aid to the blind;⁷ require denial for failure to comply with the financial responsibility laws;⁸ and one that requires denial to persons convicted of specified sex crimes.⁹

All the study states have statutory minimum age limits ranging from 16 to 21 years for various classes and types of licenses.¹⁰ Since studies demonstrate only gross relationships between age and driving failure, it is difficult to decide where to establish minimum age predictor policy cutoff points. Thus, if minimum age is used as a predictor, it does not matter greatly what age is chosen, for there will be younger individuals who are more acceptable risks than some within the age limit. Conversely, some individuals within the age limit will be unacceptable risks for licensing, but the low validity of age as a predictor means they will not be identified. Nonetheless, legislators, administrators, judges, and lawyers continue to cry out for raising minimum licensing ages to eliminate more young driver applicants. Apparently they fail to recognize that approximately 50 percent of the population will soon be younger than age 25.¹¹ Such a large segment of the public cannot be denied the license on some "save them from themselves" theory of safety. These young people comprise a legitimate part of the society, and their need to use motor vehicles must be recognized. Sociopolitical pressures simply

⁴ CAL. VEHICLE CODE §§ 12508(h) 15000-15028, 15024 (West 1960); FLA. STAT. ANN. §§ 322.03(1), (4), 322.18, 322.01(17), 322.43 (1965); ILL. ANN. STAT. ch. 95½, § 6A-101(b) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2751 (Burns 1966); MICH. STAT. ANN. § 9.2001(a)(b) (1967); N.J. STAT. ANN. § 39:5D (Supp. 1969); N.Y. VEH. & TRAF. § 516 (McKinney 1960); OHIO REV. CODE ANN. § 4507.02 (Page 1965); UNIFORM VEHICLE CODE § 6-101(a) (1968).

⁵ IND. ANN. STAT. § 47-2704(D) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); PA. STAT. ANN. tit. 75, § 604(a)6 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 30 (1965).

⁶ IND. ANN. STAT. § 47-2704(D) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); OHIO REV. CODE ANN. § 4507.08(B) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)6 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(6) (1965).

⁷ TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(10) (1965).

⁸ FLA. STAT. ANN. § 324.101 (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(7) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(g) (Burns 1966); N.J. STAT. ANN. § 39:6-28(a) (1961); N.Y. VEH. & TRAF. § 335 (McKinney 1960); OHIO REV. CODE ANN. § 4509.18 (Page 1965); PA. STAT. ANN. tit. 75, § 1408 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h, § 8(a) (1965).

⁹ ILL. ANN. STAT. ch. 95½, § 6A-103(10) (Smith-Hurd 1958).

¹⁰ See statutes cited *supra* note 2. However, a measure of discretion is commonly transferred to administrators, for they are often given authority to issue various types of restricted licenses at lower ages if deemed appropriate. See, e.g., FLA. STAT. ANN. § 322.05(1)(2) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(1) (Smith-Hurd 1958); MICH. STAT. ANN. §§ 0.2003(1) 9.2511 (1967); N.Y. VEH. & TRAF. § 501(1)b (McKinney 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(1) (1965). Illinois provides a maximum age limit of 69, but it may be waived upon reexamination in the discretion of the administrator.

¹¹ This is indicated by current statistical projection of population composition.

will not permit continual raising of minimum age limits. There are, therefore, both political and scientific limitations on what can be done with the minimum age limit as a licensing predictor. Nevertheless, licenses will probably continue to be denied on the basis of the single factor of age until scientific research describes accurately the nature and extent of the relationship between age and human failure as a driver.

It is to be expected that driver selection policy would forbid issuing a new license to applicants already under suspension or revocation.¹² The prediction decision has already been made as to them. Denial on this basis is actually an enforcement policy. But it is also another illustration of a licensing policy made at the legislative level and implemented ministerially by the agency. Unfortunately, some statutes do not specify whether this denial command from the legislature applies to applicants whose licenses have been suspended or revoked in other states.¹³ But six of the study states are parties to the Driver License Compact, which forbids issuing a license to a person under suspension in another party state.¹⁴

Eight of the study group states have included the "one license" concept among the license denial policies in their selection systems. The concept is actually a licensee control policy, for it contains no predictive element. Its import is that the license applicant must surrender all valid driver's licenses issued by another state, or the application will be denied. The significance of the concept is that it provides more effective administrative control over individual licensees in that, in theory at least, it prevents a person from using two or more licenses from different states to avoid building a single driver performance file in the office of one administrator.¹⁵ For instance, if a driver exhibits a foreign state license and not a local state license at the time of traffic arrests, convictions, and accidents, he may avoid attracting the attention of the state licensing administrator, for no conviction or accident reports will appear in his record. If all accident reports, records of convictions of traffic violations, and other information are sent to some foreign state in which the driver no longer resides, he continues driving in the local jurisdiction undetected as a potentially unacceptable licensing risk because the license withdrawal predictors built into the system cannot identify him.

On the other hand, if only one license is permitted each driver, a single record will be accumulated in the current state of licensing. Upon

¹² *Supra* note 3.

¹³ FLA. STAT. ANN. § 322.05 (1965); IND. ANN. STAT. § 47-2704(a) (Burns 1966); MICH. STAT. ANN. § 9.2003 (1967); OHIO REV. CODE ANN. § 4507.08 (Page 1956); PA. STAT. ANN. tit. 75, § 604(a) 2,3 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(4) (1965).

¹⁴ CAL. VEHICLE CODE § 15024 (West 1960); FLA. STAT. ANN. § 322.43 (1965); ILL. ANN. STAT. ch. 95½, § 501 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2751 (Burns 1966); N.J. STAT. ANN. § 39:5D (Supp. 1969); N.Y. VEH. & TRAF. § 516 (McKinney 1960).

¹⁵ For a discussion of the concept, see National Committee on Uniform Traffic Laws and Ordinances, 1 TRAFFIC LAWS ANNUAL 157 (1964).

moving from one state to another, becoming a resident, and being re-licensed there after surrender of the foreign license, the administrator of the new state may obtain a complete record on each applicant who has been licensed previously. The practice permits the building of a single, nationwide performance file that will follow the driver wherever he establishes residence and obtains a new license. A complete performance record is necessary if the *withdrawal* predictor policies are to be applied. In addition, the record may serve as an important data source for licensing research.

Whether the single occurrence that led to the display of one of several licenses would have led to a license withdrawal is beside the point. What is important is an appreciation of the fact that multiple licensing frees the driver from effective administrative control. As a result the public interest suffers, for in some cases the licensing agency may be thwarted in its efforts to prevent accidents caused by human failure. It is difficult to understand why all legislatures do not recognize the potential improvement in licensing administration offered by the "one license" concept.¹⁶ Fortunately, it is included in the uniform licensing standard promulgated by the NHTSA.¹⁷ As such it will be difficult to ignore.

The concept is currently implemented in eight of the study states by statute or by partyship to the Driver License Compact.¹⁸ The latter is an interstate compact prepared on the basis of congressional implementing legislation known as the Beamer Resolution,¹⁹ which gives the states permission to make agreements and compacts "in the establishment and carrying out of traffic safety programs."²⁰ At least six of the study states have become parties to the Compact.²¹ Two states require license surrender by statute,²² three states have both,²³ and two states apparently

¹⁶ At least 34 states have adopted the concept, through either their statutes or the surrender provisions of the Driver License Compact. For a state-by-state analysis, see the chart of states in *Hearings on S. 1467 Before the Subcomm. on Roads of the Senate Comm. on Public Works* 90th Cong., 1st Sess. at 183 (1967).

¹⁷ National Safety Standard No. 5, Driver Licensing, 23 C.F.R. subpart B, § 204.4 (1969).

¹⁸ Development of this Compact was "initiated at the request of three organizations . . . the Western Interstate Committee on Highway Policy Problems, the western branch of the AAMVA, and the Western Governors' Conference." Foreword, COUNCIL OF STATE GOVERNMENTS, INTERSTATE COMPACTS FOR TRAFFIC SAFETY (1962).

¹⁹ 23 U.S.C. § 313 (1963).

²⁰ *Id.* Such an interstate compact would not be permissible without implementing legislation in view of U.S. CONST. art. I, § 10, para. 3, which provides: "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state, or with a foreign power. . . ."

²¹ CAL. VEHICLE CODE § 15000-15028 (West 1960); FLA. STAT. ANN. § 322.43 (1965); ILL. ANN. STAT. ch. 95½, § 501-505 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2751 (Burns 1966); N.J. STAT. ANN. § 39:5D (Supp. 1961); N.Y. VEH. & TRAF. § 516 (McKinney 1960).

²² MICH. STAT. ANN. § 9.2001(a)(b) (1967); OHIO REV. CODE ANN. § 4507.02 (Page 1965).

²³ CAL. VEHICLE CODE §§ 12805, 15000-15028 (West 1960); FLA. STAT. ANN. § 322.18, 322.01(17), 322.43 (1965); ILL. ANN. STAT. ch. 95½, § 6A-101(b), 501 (Smith-Hurd 1958).

continue to allow multiple licensing.²⁴ New Jersey requires license surrender by an agency rule²⁵ complementing the requirements of the Compact, to which it is a party.

The New Jersey policy established by rule of the administrative agency is an illustration of constructive administrative practice. The New Jersey administrator did not wait for the legislature to act on the "one license" concept. Instead, he used his rule-making power and promulgated a policy that could be implemented immediately. Similar action could be taken in other states where legislatures fail to act immediately on the NHTSA licensing standard, for example. It is distressing that many administrative officials are either unaware of their rule-making power or do not choose to exercise it.

Other than the agency rule-making technique, a statute or a combination of both statute and Compact are probably more effective devices to establish the "one license" concept. Properly drafted statutory surrender provisions may include all foreign states, but the surrender requirements of the Driver License Compact²⁶ apply only to licenses issued by states that are parties to the Compact. Whatever method is chosen, the "one license" concept has a potential for effective driver licensing administration that should not be lightly dismissed. The policy is usually expressed specifically by statute or the Compact and is applied ministerially by the administrative agency; hence, no power transfer occurs.

At least five study states have established a licensing predictor policy that denies the license to applicants who have been "adjudged" to be "epileptic,"²⁷ "insane," "idiot," or "imbecile" and who have not been restored to competency by *judicial decree*.²⁸ The statutes are precise and therefore the policy is legislative. No power is transferred to the administrative agency unless the word "adjudged" is given a strained interpretation. Legislators do not seem to recognize that courts do not normally "adjudge" persons to be epileptic, idiots, or imbeciles. Courts adjudge people to be "insane," or "incompetent," and it is apparent this is what the legislature means because of the requirement that competency be restored by *judicial decree*. Such a provision is ineffective, in itself, to require denial of the license to epileptics for the reason that most of them have not been the subject of *adjudication* proceedings. The same may be said of idiots and imbeciles. This is not to say that the administrator must license epileptics; it is only to demonstrate that

²⁴ Pennsylvania and Texas.

²⁵ Departmental Regulation 13: 4-121, Aug. 20, 1965.

²⁶ Driver License Compact, Article V, Section 3.

²⁷ IND. ANN. STAT. § 47-2704(D) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); PA. STAT. ANN. tit. 75, § 604(a)6 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 30 (1965).

²⁸ IND. ANN. STAT. § 47-2704(D) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); OHIO REV. CODE ANN. § 4507.08(B) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(6) (1965).

the statute is ineffective as an automatic exclusion predictor. Actually, to deny the license the administrator must resort to some other available power base that gives him authority to deny the license for safety reasons.

A Texas legislative predictor policy requires denial of the license to applicants who have applied for or who receive aid to the blind.²⁹ Presumably one who falls in this category suffers from such visual defects as to be unacceptable as a driver. However, this sort of automatic predictor may be too severe. Its impact depends on the state policies for aid to the blind generally, rather than visual ability as it relates to driving ability. For example, let us assume the state follows the practice of licensing applicants who are blind in one eye if the other eye is satisfactory. If state policy provides aid to the partially blind, the applicant will be denied a license automatically if he has applied for or receives that partial aid. He must choose between the driver's license and financial compensation for his partial blindness. He cannot have both. The agency cannot provide relief, for the legislative policy is precise and is to be applied mechanically by the licensing agency. It has no choice, for no power is transferred to it to ignore the legislative command and establish its own policy, as New Jersey could do in the case of the "one license" concept.³⁰ The blind aid exclusion statute may be stated too broadly. Under proper circumstances it could be held unconstitutional as an improper classification of applicants denying them equal protection of the laws. The impact of such a constitutional decision on driver licensing systems could be avoided by establishing statutory vision guidelines and permitting the agency to establish specific vision predictor policies by rules and regulations. If an agency rule is declared unconstitutional, no harm is done the system, for new rules may be readily made. Striking down a statute as unconstitutional in principle is far more drastic, for it raises the question of the extent of legislative power in the field of driver licensing.³¹ Striking down an agency rule for unconstitutionality does not reflect adversely on the legislative power base, but merely finds the particular standard or criterion of judgment to be improper.

Denial of the license may also result from (a) driving without being licensed, (b) becoming involved in an accident in which there is death, bodily injury, or property damage in excess of \$100, and (c) if not insured, failing to post a security deposit for potential damages arising

²⁹ TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(10) (1965).

³⁰ Departmental Regulation 13: 4-121, Aug. 20, 1965.

³¹ See, e.g., Note in 12 STAN. L. REV. 208 (1959) re the preemption doctrine as a preferred device of the Supreme Court when balancing state police power against congressional power in the commerce area. See also the concurring opinion of Mr. Justice Jackson in *Railway Express Agency v. New York* 336 U.S. 106, 112 (1949), wherein he describes the advantage of using the equal protection clause as a basis for constitutional decision for the reason that it does not disable any governmental body from legislating further in the area.

out of the accident.³² A primary question here concerns the degree of relationship between financial responsibility statutes and prevention of driving failure. However, any constitutional issues have probably been resolved in favor of the financial responsibility principle by the U.S. Supreme Court in *Kesler v. Dept. of Public Safety of Utah*³³ and *Reitz v. Mealey*.³⁴

A final illustration of a legislatively made predictor policy that commands denial of the license is so extreme as to raise grave doubts as to its constitutionality. By Section 6A-103(10) of its driver licensing statutes, Illinois requires denial of the license to applicants who have been convicted of the sex crimes specified in Section 6A-205. That section lists the following offenses: "... commission and conviction of the following sex offenses: rape, sexual crime against children, crime against nature, and soliciting in the streets."

Does it follow that there is any predictive relationship between these crimes and human failure as a driver? Is not such a licensing predictor completely invalid or of such low validity as to be worthless as a means of identifying applicants who will fail as drivers? In legal terms it may be urged that there is no rational relationship between such a predictor policy and the legislative goal of preventing the human failure that leads to accidents. Lacking rationality and reasonableness, the predictor policy is unconstitutional as a denial of due process of law or equal protection of the laws, or both. Unless a rational relationship between the policy and the goal can be shown, this predictor policy accomplishes nothing for safety. By denying the applicant the opportunity to operate a motor vehicle, this predictor policy serves merely to deprive him of an important means of expressing his constitutional liberty to travel.³⁵ Policies of this sort represent an attempt to control individual morality and character and punish antisocial conduct under the guise of highway safety.³⁶ A full discussion of constitutional issues relevant to licensing policies appears in Part III, PEOPLE. It is enough simply to raise the question here.

These examples of statutes that command denial of licenses serve to

³² FLA. STAT. ANN. § 324.101 (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(7) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(g) (Burns 1966); N.J. STAT. ANN. § 39:6-28(a) (1961); N.Y. VEH. & TRAF. § 335 (McKinney 1960); OHIO REV. CODE ANN. § 4509.18 (Page 1965); PA. STAT. ANN. tit. 75, § 1408 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h, § 8(a) (1965).

³³ 369 U.S. 153 (1962).

³⁴ 314 U.S. 33 (1941).

³⁵ Liberty to travel is recognized as a constitutional right in *Shapiro v. Thompson*, 394 U.S. 618 (1969); *U.S. v. Guest*, 383 U.S. 745 (1966); *Kent v. Dulles*, 357 U.S. 116 (1958).

³⁶ Under the police power, the legislatures might deny licenses as part of the punishment for criminal conduct. Unless determined to be a cruel and unusual punishment it would probably be valid. However, state legislatures generally insist that licensing controls are remedial, nonpunitive, and applied solely as safety measures. The legislature must, then, choose to pursue one of several courses.

demonstrate the mixture of objective prediction and sociopolitical interests that are to be found in licensing system predictor policies. Consider the two faces of the predictor policies discussed. Some represent attempts to predict human failure. These include minimum age limits, denial of epileptics, the insane, and the blind. Of course, these predictors represent social policy as well. Others do not pretend to predict anything, but are relevant legal policies designed to make driver selection and control programs more effective. They include the "one license" concept, denial of the license to persons already under license suspension or revocation, and, perhaps, denial of the license for failure to comply with financial responsibility laws. Finally, an expression of pure social policy that is *irrelevant* because it does not appear to be a valid predictor of human failure while driving is the statute requiring denial of the license upon conviction of certain sex crimes. Yet, it is *irrationally* imposed on driver license applicants as a component of the Illinois selection-prediction system.

The pursuit of mixed goals is evident throughout the various levels of licensing administration, and it suggests a continuing struggle between science and freedom, enforcement and freedom, and morality and freedom. How should a balance be struck? If research efforts developed a highly accurate and efficient system of driver selection, would sociopolitical concerns permit its adoption?³⁷ Or, would PEOPLE prefer something less perfect in order to enjoy more freedom? Balancing off the science of prediction and its enforcement (whether good or bad science or prediction) against the social interests of PEOPLE as a group and as individuals cannot be avoided in our scheme of government. We probably would not want it to be otherwise.

Furthermore, notice how difficult it is to identify legislative predictor policies that are so precise that they may be applied ministerially and without use of administrative discretion. In the field of driver licensing, illustrations of legislative predictor policies are few in number. Precision in licensing statutes is the exception rather than the rule, despite the common assumption that legislatures make policy and agencies only apply it.

Formalistic-Discretionary Exclusion Policies

A second group of driver exclusion standards consists of agency-created policies growing out of imprecise statutes that must be made specific if they are to be implemented. Such statutes involve a subtle, but undeniable, transfer of power from legislature to agency because their lack of precision prevents their mechanical application.

The first set of examples excludes applicants on the basis of mental

³⁷ See F. James, in HIGHWAY RESEARCH BOARD SPECIAL REPORT 86, A COLLOQUY ON MOTOR VEHICLE AND TRAFFIC LAW 53 (1965); AUTOMOTIVE SAFETY FOUNDATION, DRIVER LICENSING—A MAJOR PROBLEM IN NON-UNIFORMITY 1-2 (Report No. 13) (1962).

and physical conditions and defects that are thought to relate to driver performance. Included are statutes requiring denial of the license to the "habitual drunkard,"³⁸ the "habitual user" of narcotics³⁹ or other drugs,⁴⁰ the narcotics addict,⁴¹ the epileptic,⁴² the insane,⁴³ and the feeble-minded.⁴⁴

Another set of examples excludes applicants on the basis of minimum age limits, but permits licensing under hardship conditions. Examples include statutory provisions that allow issuing licenses to under-age applicants because of "inadequate" transportation facilities,⁴⁵ or where "necessary due to illness of a family member,"⁴⁶ or where a parent "requires in his business" use of the minor as a driver.⁴⁷ Even broader is statutory language that permits licensing of under-age applicants for "extenuating circumstances and special reasons, or need,"⁴⁸ "proof of hardship,"⁴⁹ "emergency,"⁵⁰ "unusual economic hardship,"⁵¹ or because lack of a license would be "detrimental to the general welfare" of the applicant or his family.⁵²

The legislative classifications of mental and physical conditions have been criticized for what they omit as well as for what they contain. It

³⁸ FLA. STAT. ANN. § 322.05(4) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(4) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(c) (Burns 1966); MICH. STAT. ANN. § 9.2003(4) (1967); OHIO REV. CODE ANN. § 4507.08(a) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)5 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(5) (1965).

³⁹ FLA. STAT. ANN. § 322.01(16) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(4) (Smith-Hurd 1958).

⁴⁰ CAL. VEHICLE CODE § 12805(b) (West 1960); FLA. STAT. ANN. § 322.05(4) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(4) (Smith-Hurd 1958).

⁴¹ CAL. VEHICLE CODE § 12805(b) (West 1960); IND. ANN. STAT. § 47-2704(c) (Burns 1966); MICH. STAT. ANN. § 9.2003(4) (1967); OHIO REV. CODE ANN. § 4507(a) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)5 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(5) (1965). One study indicates addicts have no greater accident rate per vehicle mile than other groups: see J. Waller, *Chronic Medical Conditions and Traffic Safety*, 273 NEW ENGLAND JOURNAL OF MEDICINE No. 26 at 1413-1420 (1965). See also Wheatley, *Will Health Standards Outlaw Auto-Drivers?*, 40, 43 TRIAL, Apr./May, 1966.

⁴² CAL. VEHICLE CODE § 12805(d) (West 1960); IND. ANN. STAT. § 47-2704(d) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); PA. STAT. ANN. tit. 75, § 604(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 30 (1965). These statutes are to be distinguished from those which exclude *adjudicated* epileptics.

⁴³ CAL. VEHICLE CODE § 12805(c) (West 1960); FLA. STAT. ANN. § 322.05(5) (1965); ILL. ANN. STAT. ch. 95½, § 6A-103(5) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2704(D) (Burns 1966); MICH. STAT. ANN. § 9.2003(5) (1967); OHIO REV. CODE ANN. § 4507.08(B) (Page 1965); PA. STAT. ANN. tit. 75, § 604(a)6 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(c) (1965).

⁴⁴ *Id.*

⁴⁵ CAL. VEHICLE CODE § 12513 (West 1960).

⁴⁶ CAL. VEHICLE CODE § 12513 (West 1960).

⁴⁷ ILL. ANN. STAT. ch. 95½, § 6A-111(a) (Smith-Hurd 1958).

⁴⁸ MICH. STAT. ANN. § 9.2012(a) (1967).

⁴⁹ OHIO REV. CODE ANN. § 4507.08 (Page 1965).

⁵⁰ TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(1) (1965).

⁵¹ TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(1) (1965).

⁵² TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(1) (1965).

has been pointed out, for example, that there is little distinction in terms of potential human failure between the individual who is an epileptic and one who suffers from another disease that subjects him to a similar risk of loss of consciousness.⁵³ Such diseases include hypoglycemia, carotid sinus syncope, porphyria, vasa-vagal attacks, Stokes-Adams syndrome, hyperventilation syndrome, hypertensive encephalopathy, and narcolepsy.⁵⁴ Consequently, the term "epileptic" is too restrictive for use as a statutory policy guideline describing episodic loss of consciousness.

Manifestly, there are other types of physical and mental conditions that could be expected to be equally important predictors of human driving failure, yet they are not included in the statutes. A comprehensive statutory predictor guideline would permit predictions of failure based on all illnesses and conditions having similar manifestations that increase the risk of human failure while driving. If legislators are seriously concerned about the danger of loss of consciousness while driving, their statutes should contain descriptions of symptoms or medical factors rather than simplistic labels such as "epileptic." It is the effect of loss of consciousness on driving capability that is critical, and it is not unlikely for the loss of consciousness to result from a host of physical or mental conditions and illnesses.

A statutory exclusion policy guideline using the label "epileptic" may also be criticized for the injustice it permits. License applicants who are so excluded are well aware that there are others who suffer similar disabilities but are allowed to drive.⁵⁵ An equal-protection-of-the-laws attack on the "epileptic" exclusion statute might fail, for it is well established that government may legislate in a piecemeal fashion. Furthermore, it would be necessary to demonstrate there is no rational relationship between epilepsy and human failure while driving. Rather than flatly exclude epileptics, Illinois and Ohio have taken a more sophisticated approach to the epilepsy problem. They permit licensing if a medical evaluation determines the applicant's condition is under control.⁵⁶

⁵³ Fabing & Barrow, *Restricted Drivers' Licenses to Controlled Epileptics: A Realistic Approach to a Problem of Highway Safety*, 2 U.C.L.A. L. REV. 500 (1955); Galton, *Sleepy All the Time?* *Parade*, May 29, 1966, at 12.

⁵⁴ Galton *supra* note 53, discusses a study at Lahey Clinic involving narcoleptics which reports that, of 105 persons diagnosed as having narcolepsy, 81 admitted they had experienced undue drowsiness while driving, 42 actually fell asleep at the wheel, and 17 had accidents as a result of falling asleep. Of 105 persons diagnosed as free from narcolepsy, 15 had experienced drowsiness while driving and then on rare occasions. Only 1 had ever had an accident by falling asleep.

⁵⁵ Fabing & Barrow, *supra* note 53 at 502.

⁵⁶ Illinois makes provision for the epileptic to obtain a license if a competent medical specialist states it would not be inimical to public safety to do so: ILL. ANN. STAT. ch. 95½, § 6A-103(8) (Smith-Hurd 1958). Ohio has enacted legislation allowing issuance of 6-month restricted licenses to persons subject to "any condition resulting in episodic impairment of consciousness or loss of muscular control" on the basis of a physician's statement, followed by an examination if deemed necessary by licensing

Statutory labels for physical or mental conditions such as "habitual drunkard," "addict," and "feeble-minded" suffer the same deficiencies. Epilepsy statutes are only an illustration. Statutory predictor guidelines that describe physical and mental symptoms and medical factors known to be predictive of driving failure would be more useful than the current labeling. But it must not be forgotten that the current state of knowledge will not permit this to be done because it requires scientific knowledge of what the driving task entails. Therefore, government awaits quantification of the driving task and, meanwhile, continues its hit-and-miss predictions. Several states and the NHTSA have begun to emphasize the use of medical boards to develop pertinent licensing predictor policies.⁵⁷ But they, too, will continue to guess. However, at least their guesses will be somewhat educated if they are knowledgeable of the research results in the field. Medical boards are discussed in detail elsewhere.⁵⁸

If he is to implement mental and physical condition statutes, the administrator must first provide them with specific content of his own making. Perhaps he will be aided by a medical advisory board. Even so, how is it determined, for instance, that one has become a "habitual drunkard" or "addicted" to narcotics? And by what standards and criteria? Is "habitual drunkard" interpreted to apply only to the chronic alcoholic? If so, how is a chronic alcoholic identified? Is there a distinction to be made between addiction to and habitual use of narcotics or other drugs? What substances are considered to be included within the phrase "other drugs"? How many seizures, of what frequency and degree of severity, are necessary before one is to be regarded as an epileptic? If the statute provides that "adjudicated" epileptics are barred from licensing, does this mean nonadjudicated epileptics are eligible?

The mental and physical condition statutes provide general guidance at best. It is the administrator who must struggle with the questions raised and shape the specific predictor policies that will be applied to applicants in the selection-prediction process. Therefore, it is the administrator who creates the predictor. In so doing, he also makes "law" or policy. No complaint is to be registered about the creative responsibility transferred to the administrator by the vagueness of the statutes. Creativity is a necessary responsibility of administration if it is recognized that the details of a comprehensive driver selection system cannot be mandated by the legislature in statutes. Time is wasted in arguing whether

officials. The statute also contains appeal provisions that permit medical review of a license denial: OHIO REV. CODE ANN. § 4507.08(C) (1) (Page 1965).

⁵⁷ Kerrick, Medical Advisory Committees, in DEPT OF HEALTH, EDUC. AND WELFARE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON MEDICAL ASPECTS OF DRIVER SAFETY AND DRIVER LICENSING at 33-39. See also, Workshop IV in PROCEEDINGS, *supra*, at 78-80. States mentioned as having such boards are Kentucky, Florida, Maryland, Oregon, Maine. See also National Highway Safety Standard No. 5, 23 C.F.R. subpart B, § 204.4 (1969).

⁵⁸ See discussion in ch. 8, *infra*.

administrators "ought" to make predictor policies. The fact is that they must and they do!

Since these administratively devised policy predictors do not appear in the statutes that make them necessary, it is imperative that they be made known. This is done by describing the specific predictor policy in a rule or regulation or in a published report of an agency licensing decision.⁵⁹ Unless the predictor policy used is made public in some manner, it is impossible for the public to know the substantive standards by which it is being regulated.

Much of the analysis and criticism of medical and physical exclusion guidelines is similarly applicable to the statutes that permit the licensing of otherwise excluded applicants under hardship conditions. The power transferred is broad, for the labels used are not so restrictive as is "epileptic." Here, it is "hardship" or "extenuating circumstances" or the like. These terms cover more ground. But they, too, must be given precision by the administrator if they are to be implemented, for he must decide what constitutes "hardship," "emergency," or "special circumstances." Once more the predictor policy (*i.e.*, the "law") must be made by the administrator.

However, the real significance of hardship licensing lies elsewhere. Physical and mental condition policy guidelines *do attempt to predict* human failure, and are, therefore, bona fide predictor policies that address the goal of preventing human failure. Hardship licensing policies *do not predict* anything, but are manifestations of a sociopolitical decision that it is acceptable in some cases to ignore the safety predictor (*e.g.*, minimum age limit) and issue a license. The mixed motives of legislatures are apparent, and in this instance the social necessity to drive a motor vehicle is recognized and given precedence. Hardship licensing policies corroborate the earlier suggestion that sociopolitical pressures *require* the licensing of most applicants. PEOPLE really do not want too much driver control at the cost of undue interference with their individual (and family) needs.

Again, the transfer of power to the administrator is recognized as legitimate, but the administrator should make known the specific policies he applies in hardship licensing cases. A statutory guideline termed "hardship" is less precise than the labels "epileptic" and "addict." Hence it is even more important for the public to be informed of the administrative interpretation given to it. The greater latitude that is transferred to the administrator here gives him more opportunity to act creatively. But that creativity must be somehow kept within bounds. Announcement of the specific administrative policy criteria and standards applied in various hardship cases is the primary means of doing so.⁶⁰

⁵⁹ Licensing agencies have promulgated some rules and regulations, but none of them publish their licensing decisions as, for example, do many of the federal agencies.

⁶⁰ However, this assumes some limiting effect on the agency by the announcement. It does not prove the administrator actually uses the formally announced policies in practice.

Discretionary Exclusion Policies

The third group of exclusion statutes consists of those that overtly transfer to the administrator broad authority to deny licenses or learner's permits on the basis of "good cause," "opinion," or "discretion." Illustrative is an Illinois statute that requires denial of the license if there is "good cause to believe that such person by reason of physical or mental disability would not be able to operate a motor vehicle with safety upon the highways."⁶¹ Its Texas counterpart forbids licensing

. . . when in the opinion of the Department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways.⁶²

Even broader authority is granted by a Florida statute that simply provides no license will be issued where there is good cause to believe that driving by the applicant on the highways "would be detrimental to public safety or welfare," with the provision that deafness alone is not disqualifying.⁶³

Some statutes indicate learner's permits are to be issued at the discretion of the agency. In Ohio, for example,

The registrar of motor vehicles . . . upon receiving . . . an application for a temporary instruction permit, may issue such permit entitling the applicant . . . to drive a motor vehicle upon the highways when accompanied by a licensed operator or chauffeur. . . .⁶⁴

A similar statute in California provides such permits "for good cause may issue to the applicant"⁶⁵ for driving up to 6 months, when accompanied, for purposes of learning to drive.

As for those under the basic minimum licensing age who apply for learner's permits to enroll in driver education courses or for supervised individual instruction by a licensed driver, the study states generally provide that such licenses may be issued at the discretion of the administrator.⁶⁶ The Michigan statute is a typical example:

⁶¹ ILL. ANN. STAT. ch. 95½, § 6A-103(8) (Smith-Hurd 1958).

⁶² TEX. REV. CIV. STAT. ANN. art. 6687b, § 4(8) (1965).

⁶³ FLA. STAT. ANN. § 322.05(7) (1965).

⁶⁴ OHIO REV. CODE ANN. § 4507.05 (Page 1965). In a similar vein are MICH. STAT. ANN. § 9.2006(a) (1967); N.J. STAT. ANN. § 39:3-13 (1961); PA. STAT. ANN. tit. 75, § 606(a) (Purdon 1960).

⁶⁵ CAL. VEHICLE CODE § 12509 (West 1960).

⁶⁶ CAL. VEHICLE CODE § 12509 (West 1960); FLA. STAT. ANN. §§ 322.05(1), 322.16(2) (1965); MICH. STAT. ANN. § 9.2006(b) (1967); ILL. ANN. STAT. ch. 95½, § 6A-105(a)(b) (Smith-Hurd 1958); N.J. STAT. ANN. § 39:3-13.1 (1961); N.Y. VEH. & TRAF. § 501(4)b (McKinney 1960); OHIO REV. CODE ANN. § 4507.05 (Page 1965); PA. STAT. ANN. tit. 75, § 606(a) (Purdon 1960) (with parental consent).

(a) The director upon receiving from any person over the age of 14 years [the basic minimum age limit is 16] . . . may issue such a permit entitling the applicant . . . to drive a motor vehicle upon the highways for a period of 60 days when accompanied. . . . (b) The director . . . in his discretion may issue a restricted instruction permit . . . to an applicant who is enrolled in a driver-education program. . . .⁶⁷

The exclusion predictor policies of New Jersey and New York must be included in this third group, for the generality of their statutes means the driver selection system is largely created by the administrative agency. Thus, their exclusion policies are completely within the control of the agency in many instances.

This third group of statutes has the effect of transferring virtually uncontrolled exclusion authority to the administrator. His policy choices are multiple and are limited only by the vague concept "highway safety" and court review of his decisions. But court control means *external* control and is limited at best. Any *internal* controls on use of transferred power must be established by the administrator himself, for the statutes are clearly lacking in control content. Here there is no statutory predictor policy and no statutory policy predictor guideline. Articulation of the specific predictor policies based on such power transfer language is more important than in the case of the first two groups because of the complete lack of significant statutory guidelines. The primary questions are: What use has been made of this administrative power to make law? and Where and how is it controlled internally?

As the spectrum of exclusion predictor policies presented by these three groups is surveyed it becomes apparent that, as the statutes become less precise, the scope of the transferred power widens and, accordingly, the need for agency articulation of its predictor policies increases. The legislatively created predictor policy is a rarity. Most licensing system statutes fall into the second or third group and must be made specific by the agency. Consequently, the agency develops most of the predictor policies (*i.e.*, the "law") and that "law" (*i.e.*, the predictor policies) must be made known if it is to be evaluated and controlled. Analysis of statutes is insufficient, as has been demonstrated.

⁶⁷ MICH. STAT. ANN. § 9.2006(a)(b) (1967).

THE LICENSING PROCESS: EVALUATION AND FORMALISTIC- 7 DISCRETIONARY EVALUATION POLICIES

The application and initial determination of eligibility having been made, evaluation of the applicant's fitness to drive without failure is the next step in the licensing process. Evaluation (prediction-selection) may take the form of standardized testing, or it may be based on an assessment of the individual applicant on medical or other grounds. It is assumed that the licensing state requires some form of evaluation of applicants, although the scope of the evaluation may vary among the states.

THE EVALUATION REQUIREMENT

All the study states require an evaluation of applicants on the basis of some predictor policies, but there are differences that should be noted. For example, Illinois makes mandatory the evaluation of all applicants for an "original" license but not applicants previously licensed in Illinois, another state, or another country.¹ Thus Illinois depends to some extent on its own earlier selection decision and that of other states and countries. The California statutes contain similar language but may be construed to mean "original" applicants for a *California* license, thus denying any exemption to licensees from other states.²

Ohio permits waiver of the evaluation if the applicant has successfully completed a driver training course.³ Passing the course is assumed to be a valid predictor of success as a driver.

Pennsylvania makes evaluation mandatory but qualifies this by per-

¹ ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1966).

² CAL. VEHICLE CODE § 12803 (West 1960).

³ OHIO REV. CODE ANN. § 4507.10 (Page 1965).

mitting waiver if the administrator is satisfied the applicant is fully qualified as an operator.⁴ This provision permits a highly individualized and highly subjective prediction to be made where a waiver is granted by the licensing agency.

The remaining six study states appear to make evaluation mandatory for all original license applicants, but it is not clear whether the evaluation is also mandatory for applicants licensed in other states or foreign countries or previously licensed in those states.

The National Highway Traffic Safety Administration driver licensing standard requires an "initial examination" of *each* driver, and does not specify whether a waiver is permissible for applicants licensed elsewhere.⁵ Presumably, most states will eventually comply with the NHTSA standard, and most of the disparity among the states will be eliminated. But the position of the applicant licensed in another state remains to be clarified by NHTSA.

EVALUATION METHODS

Tests

It is too easily and too often assumed that administrative prediction of the later driving success or failure of license applicants is accomplished by administering a series of standardized tests. This probably follows from the fact that most statutes and the NHTSA standard speak in terms of evaluating by means of an "examination." The notion of evaluating (prediction-selection) by examination may also be erroneously taken to imply the predictive validity of the test administered. Tests suggest, as well, that all applicants are treated alike.

The validity of tests as predictors of future driving failure has been and will continue to be questioned. But from a legal viewpoint, evaluation by test is especially desirable even though the tests are known to be poor predictors. If one assumes the state governments and the NHTSA will continue to insist on license applicant evaluation despite the lack of scientific validation of the predictors currently used, the test method is more compatible with due process and equal protection guarantees of fairness to the applicant. Of course, there is no requirement that legal policy be based on total empirical knowledge, and examples of unscientific legal policy decisions are abundant. However, the primary protection against legally arbitrary governmental action where scientific evidence of rational relationship to legislative goals is lacking (*i.e.*, poor predictors are used) is to require even-handed application of whatever predictor policy is adopted. At least tests, however good or bad they may be, press toward administrative consistency and fairness in making the

⁴ PA. STAT. ANN. tit. 75, § 608(a,d,e) (Purdon 1960).

⁵ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

evaluation. They also substitute for trial-type administrative hearings. However, the need for a trial-type hearing may arise if there is a question as to the consistency and fairness of the process used to administer the test and score it. If the test itself or the scoring system is to be attacked, this may be done independently of its application to a particular person. In either case a hearing opportunity may be made available after testing and may be limited in its scope to issues of test validity and improper application or scoring of the test.

License applicant characteristics generally evaluated by testing include (a) vision and hearing, (b) knowledge of laws and directional signs and signals, and (c) driving skills.

Administrative Judgment

The method of evaluating applicants (predicting success or failure) by judgment is a necessary administrative technique in driver selection systems. It is not, therefore, to be condemned, but its inherent dangers should be identified and the need to control evaluations (predictions) made largely by ad hoc judgment should be suggested. Perhaps its use may even be minimized. By securing agency commitment to formalized criteria and standards of judgment, something like a "test" may be devised. Even though the "test" so devised is recognized as lacking the scientific validity desired of any licensing predictor policy, the fact that it has been reduced to a standardized form has a salutary legal effect in terms of consistency and fairness of application. Again, lack of complete scientific validation of predictor policies may be acceptable if they are applied equitably! ⁶ It is in the area of evaluation (prediction) by judgment that the legal requirement of opportunity for a trial-type hearing is at its strongest.

Where the applicant characteristics evaluated are perceived to be subjective, or more subjective than others, it is commonly assumed that these "opinion" judgments or predictions are properly made on a case-by-case basis. It is further assumed that criteria or standards of decision cannot, therefore, be articulated if the judgment rests on informed opinion in the final analysis. Although it may not be possible to devise tests for all characteristics evaluated, it is possible to announce the specific factors that are used to arrive at an "opinion" judgment in a non-test area, if there has been sufficient experience to permit identification of the decision factors used (*e.g.*, applicant evaluation by a medical board). The decision factors, and not a statement of the decision, constitute the actual predictor policies applied to the applicant. As such they should be made known.

⁶ Cf. *Shaughnessy v. United States ex rel. Mezei* 345 U.S. 206, 224 (1953), dissenting opinion of Justice Jackson; compare W. Haddon, in *INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT* 17 (1968).

Applicant characteristics generally evaluated by the method of judgment include (a) diseases—physical and psychological, (b) physiological impairments (excluding vision), (c) use of drugs, (d) use of alcohol, and (e) personality factors. In addition, some characteristics nominally evaluated by tests may actually be evaluated by judgment. Driving skill tests, for example, may be loosely constructed and the skills required may be stated broadly. Hence the test content, application, and evaluation may vary greatly from examiner to examiner. If the degree of variation is significant, driving skill actually is evaluated not by standardized testing but by the judgment of the examiner.

STATUTORY EVALUATION POLICIES

No state in the study group has established by statute any applicant characteristic predictor policies that may be applied ministerially by the licensing agency. Likewise, the characteristics included in the NHTSA licensing standards may not be applied ministerially by state agencies.

FORMALISTIC-DISCRETIONARY EVALUATION POLICIES

Most applicant characteristics on which evaluations are based fall in the category of formalistic-discretionary evaluation policies. The legislatures have simply described applicant characteristics to be evaluated in broad terms and have left it to administrators to create the specific predictor policies applied.

Driving Skills

The NHTSA standard and the statutes of six states in the study group require applicants to demonstrate their ability to operate a motor vehicle.⁷ However, none of them specify the content of that demonstration. It is to be determined by administrators. Opinion varies greatly as to what should be the content and methodology of such demonstrations.

As to method, the evaluation may be conducted as a standardized test, with precisely identified skills scored numerically according to performance. Or it may be simply a general demonstration of sufficient ability to justify an overall judgment-prediction that the applicant will or will not drive a vehicle properly in the future. The latter form of evaluation is highly individualized. The individualized decision of an examiner is more easily defended than the standardized test and is more difficult to attack by the unsuccessful applicant, for it is based primarily on the judg-

⁷ National Highway Safety Standard No. 5, Driver Licensing, C.F.R. subpart B, § 204.4 (1969); CAL. VEHICLE CODE § 12804 (West 1960); FLA. STAT. ANN. 322.12 (1965); IND. ANN. STAT. § 47-2708 (Burns 1966); N.J. STAT. ANN. § 39:3-10 (1961); OHIO REV. CODE ANN. § 4507.11 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 (1965).

ment of the examiner. The unsuccessful applicant is put into the awkward position of "my word against yours" if he attacks the decision. Obviously, even a standardized test may be administered improperly, but it is subject to less abuse, and there is some basis for an attack, if the test criteria are identifiable and the scoring values are known.

To what sources does the administrator refer to decide upon the appropriate content for the skills demonstration? The National Highway Traffic Safety Administration provides no model in its driver licensing standard but suggests use of the model recommended by the American Association of Motor Vehicle Administrators.⁸ The AAMVA specifications include road test routes,⁹ type of vehicle and its inspection,¹⁰ the areas of performance to be tested,¹¹ and scoring for approval, rejection, or recommendation of approval with restrictions.¹²

In the area of driver performance, the AAMVA recommends that the applicant be evaluated as to how he handles (a) himself, (b) the vehicle, (c) road problems, and (d) traffic problems.¹³

Ability to handle "himself" includes posture, observation and span of attention, habits of caution, habits of speed control, and habits of compliance with traffic law. Handling "the vehicle" includes starting and stopping, U-turns, parallel parking, and backing the vehicle.

Ability to handle "road problems" includes performance at stop signs and traffic lights, left and right turns, driving one-way streets, and multiple-lane driving. Ability to handle "traffic problems" includes following another vehicle, overtaking another vehicle, right-of-way conduct, use of horn, movement with traffic stream, and use of signals.

The grading standards require scoring on at least 80 percent of the specifications described, and the applicant must demonstrate "acceptable performance" on at least 75 percent of all factors scored.¹⁴ In addition to the cutoff score, the applicant must be rejected if there is a collision that "the applicant could have prevented," any "dangerous action," any "hazardous violation," or "refusal or inability to follow instructions."¹⁵ A decision to license with restrictions is permitted if the examiner believes compensations may be made for physical disabilities or by limiting routes or controlling the time of operating.¹⁶

Obviously this minimum specification model for road tests is comprehensive but highly subjective in its content. Hence elaborate scoring systems have been devised to attempt to compensate for the inherent

⁸ AAMVA, TESTING DRIVERS 72-79 (1967); DEP'T OF TRANSPORTATION, HIGHWAY SAFETY PROGRAM MANUAL, VOL. 5 DRIVER LICENSING 6 (1969).

⁹ AAMVA, TESTING DRIVERS 73 (1967).

¹⁰ *Id.* at 73-74.

¹¹ *Id.* at 74-75.

¹² *Id.* at 76-78.

¹³ *Id.* at 75-76.

¹⁴ *Id.* at 76.

¹⁵ *Id.* at 76.

¹⁶ *Id.* at 77.

difficulty of evaluating objectively the performance of the applicant. The AAMVA identifies at least 11 scoring systems now in use¹⁷ and also identifies four other road-tests systems that have been developed.¹⁸ The road tests administered by the study group states are difficult to describe and evaluate. Only in Florida is road testing policy specified in departmental rules. The Florida rules describe test details and the scoring of various maneuvers.¹⁹ The driver's manuals of Indiana and Pennsylvania explain generally what will be expected of the applicant during the road test. The scoring, but not the content, of the New York road test is explained in a departmental publication entitled *Scoring a Road Test*, but not in the departmental regulations. Section 222.720 of the *Driver License Service Operations Manual* (1964) describes the scoring system applied to road testing in Texas. Road test information was not made available by the other study states. Thus, in most states it may be difficult or impossible to obtain the decision criteria and standards for road testing because they are not included in the agency's formal rules and regulations.

Of course, the proof of the pudding is in the eating. How accurate are road tests as predictors of future driver success or failure?

According to a study conducted by the Arthur D. Little organization, consisting of a review of the existing research literature by persons qualified in the relevant fields, our knowledge of driving as a skill is poor.²⁰ This corroborates Dr. Ross McFarland and others who maintain we do not have quantifiable knowledge of what the driving function entails.²¹

The Little organization was unable to evaluate driving skill according to its importance as a factor contributing to accidents. The existing research is characterized as of mediocre quality²² and having produced very little useful information so far.²³ It is stated,

To our knowledge, no one has produced sufficient data to establish his method as suitable for revealing useful, clear-cut functional relationships, although some suggested results have been obtained.²⁴

Furthermore,

In none of the research cited was an effort made in the design of the experiments to produce data which would indicate a relationship between the behavior of the driver and accident occurrence.²⁵

¹⁷ *Id.* at 80-82.

¹⁸ *Id.* at 82.

¹⁹ FLA. ADMIN. CODE AND REGISTER ch. 295A § 1.15 (1964).

²⁰ A. LITTLE, INC., THE STATE OF THE ART OF TRAFFIC SAFETY 10, 13, 62-64 (1966).

²¹ R. McFarland in DEP'T OF HEALTH, EDUC. AND WELFARE, PROCEEDINGS OF THE NATIONAL CONFERENCE ON MEDICAL ASPECTS OF DRIVER SAFETY AND DRIVER LICENSING 43 (1964).

²² TRAFFIC SAFETY, *supra* note 20, at 63-64.

²³ *Id.* at 13.

²⁴ *Id.* at 13, 62.

²⁵ *Id.* at 62. See generally research projects described at 45-62. See also J. Versace in

Hence, it is difficult to know whether to praise or condemn the states, NHTSA, and AAMVA for using a test of driving skills as a predictor policy. Certainly the relationship between driver skill and accidents is less factual than many are willing to admit. For example, a 1969 study compared road test scores with subsequent 4-year driving record or accumulated violation points in the state of Washington. The correlations were not statistically significant.²⁶

Nonetheless, driver skills will probably continue to be used as a predictor of future driving failure because most policy makers would agree that applicants should demonstrate some degree of skill before being licensed even though empirical knowledge of the nature and extent of the relationship to driving failure is lacking. To repeat, skill testing may be accepted as good law even though it is poor science. But good law, if based on poor science, requires precise articulation of the standards and criteria applied because skill testing is not necessarily a valid predictor and because it may be used as a rationale for denying the important individual interest at stake in the licensing process. Legally speaking, the public has the right to know how skill test predictions are being made so that these predictions may be evaluated in terms of the impact on freedom of mobility.

Ability to Read Highway Signs and Symbols

The NHTSA and eight of the study group states require applicants to demonstrate their ability to read and understand highway signs and symbols.²⁷ Three of the eight states specify the ability must exist to understand signs written in English.²⁸ The NHTSA standard and the state statutes do not specify the content of the demonstration. It is to be supplied by the administrators. Recognition of signs and symbols is usually contained in a written test given applicants. Thus, this applicant characteristic is evaluated in a standardized rather than an individualized manner. The test consists of being able to identify a particular sign or symbol set forth on the exam by demonstrating an understanding of its meaning. Driver licensing manuals, which are provided applicants to study, provide pictures of the signs and symbols used on that state's highways.

ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, *TRAFFIC SAFETY—A NATIONAL PROBLEM* 37 (1967).

²⁶ J. Wallace, A. Crancer, Jr. in *WASHINGTON STATE DEP'T OF MOTOR VEHICLES, LICENSING EXAMINATIONS AND THEIR RELATION TO SUBSEQUENT DRIVING RECORD* (1969).

²⁷ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1960); CAL. VEHICLE CODE § 12804 (West 1960); FLA. STAT. ANN. § 322.12 (1965); ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966); MICH. STAT. ANN. § 9.2009 (1967); N.Y. VEH. & TRAF. § 501(4)(b) (McKinney 1960) (learner's permit); OHIO REV. CODE ANN. § 4507.11 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b § 10 (1965).

²⁸ E.g., CAL. VEHICLE CODE § 12804 (West 1960); MICH. STAT. ANN. § 9.2009 (1967); TEX. REV. CIV. STAT. ANN. art. 6687b § 10 (1965).

To what sources does the administrator refer to determine which signs and symbols are important and should be recognized and understood by the applicant? What constitutes an acceptable ability by the foreign-language-speaking applicant to read signs written in English?

The NHTSA manual explaining its driver licensing standard offers no assistance. It indicates merely that the applicant should be evaluated on his knowledge of traffic signs and symbols.²⁹

The AAMVA suggests nothing more than that the road-sign test should not include directional and informational signs and signals indicating points of interest and that the test should use facsimiles of actual signs and not verbal descriptions of signs.³⁰

The Little study does not appear to consider sign identification ability as a predictor policy in driver selection. The Little study does, of course, point out that research indicates many secondary road signs are obsolete and should be replaced and that poor highway signing may contribute to accidents by confusing drivers and inducing improper actions.³¹ Evidently the administrator is left to his own devices where he is asked to predict future driver failure based in part on the applicant's ability to read and understand highway signs.

Knowledge of Traffic Laws and Rules of the Road

Nine of the study group states require applicants to be evaluated on their knowledge of traffic laws and the rules of operating behavior.³² The NHTSA includes a similar requirement in its standard but goes further and includes knowledge of "safe driving procedures, vehicle and highway safety features, emergency situations that arise . . . and other driver responsibilities."³³

Such applicant characteristics are commonly evaluated by means of a standardized written examination.

The lack of specificity in the NHTSA standard and the state statutes again forces the administrator to look to other sources for guidance when creating the examination. What should be its content? What sorts of knowledge are most relevant to success or failure as a driver? How should the examination be structured? What should be an acceptable score?

The AAMVA legitimates knowledge tests in the following language:

²⁹ DEP'T OF TRANSPORTATION, HIGHWAY SAFETY PROGRAM MANUAL, VOL. 5 DRIVER LICENSING 5 (1969).

³⁰ TESTING DRIVERS, *supra* note 8, at 66-67.

³¹ TRAFFIC SAFETY, *supra* note 20, at 157-64.

³² CAL. VEHICLE CODE § 12804 (West 1960); FLA. STAT. ANN. § 322.12 (1965); ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966); N.J. STAT. ANN. § 39:3-10 (1961); N.Y. VEH. & TRAF. § 502 (McKinney 1960); OHIO REV. CODE ANN. § 4507.11 (Page 1965); PA. STAT. ANN. tit. 75, § 608(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 (1965).

³³ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

The knowledge test consists of questions concerning general traffic laws and rules of the road. It can be assumed that drivers not familiar with these rules are likely to be problem drivers and may be involved in accidents.³⁴

AAMVA suggestions for test question construction include the following: The questions should test knowledge needed for the driving task; they should not require technical information; each question should be independent of the others; correct answers to multiple-choice questions should not be too obvious; questions and instructions should be clear enough to be understood by any literate applicant.³⁵ However, the AAMVA does not provide a sample or model test that could be adapted or used as a guide by state licensing authorities. AAMVA guidance goes no further than these suggestions.

The NHTSA manual states merely that license applicants should be evaluated on their knowledge of traffic laws. No test model is presented, nor are any content or scoring suggestions made.³⁶

To what extent have knowledge tests been validated as predictors of future driving failure? A study conducted in Germany in 1965 compared 133 good professional drivers with 56 who had poor driving records. They took the written portion of the German driver's license examination, and 78 percent of the professional drivers showed adequate knowledge of the traffic rules whereas only 39 percent of the drivers with poor records passed the examination.³⁷ However, a 1969 study compared written test scores with subsequent 4-year driving record or accumulated violation points in the state of Washington. The correlations were not statistically significant.³⁸

Again, it is difficult to know whether to praise or condemn knowledge tests as predictor policies. No policy maker would assume that knowledge tests are so lacking in predictive validity to justify dropping them. At the same time, he must face the possibility that without good reason they deny licenses to those who fail the test. Thus, such tests may not only constitute bad science (poor prediction) but they may also constitute bad law (unjustified restraint on liberty) as well.

Vision

The NHTSA licensing standard and the statutes of six states in the study group require license applicants to pass an examination of "visual

³⁴ TESTING DRIVERS, *supra* note 8, at 66.

³⁵ *Id.*

³⁶ SAFETY PROGRAM MANUAL, *supra* note 8, ch. IV at 5.

³⁷ TRAFFIC SAFETY, *supra* note 20, at 110.

³⁸ Wallace and Crancer, *supra* note 26. See also J. UHLANER AND A. DRUCKER, SELECTION TESTS—DUBIOUS AID IN DRIVER LICENSING, HIGHWAY RESEARCH RECORD NO. 84 (1965); J. Versace in ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM 37 (1967).

acuity,"³⁹ "eyesight,"⁴⁰ or "vision."⁴¹ Visual characteristics are commonly evaluated by standardized tests and not by individualized judgments of examiners, for most of the aspects of visual capacity deemed relevant to driving are readily subjected to mechanical measurement.

The AAMVA and the American Optometric Association have jointly recommended vision screening test content and vision standards for driver licensing. Administrators may refer to them for potential adoption as the specific vision predictor policies that the statutes do not provide. According to these associations the vision test should include an evaluation of visual acuity, depth perception, field of vision, muscle balance, and color vision.⁴² Development of an acceptable glare recovery test is said to be imperative.⁴³ However, the recommended vision *standards* include only visual acuity, color vision, and field of vision. Depth perception and muscle balance difficulties are to be called to the attention of the applicants and a warning given to make allowances for them while driving.

AAMVA-AOA recommended visual acuity standards are as follows: Visual acuity of 20/40 or better in both eyes and 20/30 in one eye are acceptable, with or without corrective lenses. Applicants testing below 20/40 are to be referred to a vision specialist for consultation. After consultation 20/60 or better in both eyes and 20/50 or better in one eye are acceptable with corrective lenses or if lenses will not correct. Applicants not meeting these standards are to be referred to the supervisory examiner.

AAMVA-AOA recommended color vision standards are as follows: Color vision deficiency *only* should not disqualify for licensing. Of the 10 study group states, only New York specifically requires evaluation of applicants for "color blindness."⁴⁴

AAMVA-AOA recommended standards for limited field of vision are as follows: Persons with a limited field of vision should be required to use an outside rearview mirror.

Although instructions are given to establish "uniform standards expressed as performance criteria,"⁴⁵ the NHTSA standard requires an examination of "visual acuity, which must meet or exceed state standards."⁴⁶ No specific predictor policies for evaluating "visual acuity" are

³⁹ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

⁴⁰ CAL. VEHICLE CODE § 12804 (West 1960); FLA. STAT. ANN. § 322.12 (1965); ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966).

⁴¹ N.Y. VEH. & TRAF. § 501(4)(b) (McKinney 1960) (learner's permit); TEX. REV. CIV. STAT. ANN. art 6687b, § 10 (1965).

⁴² TESTING DRIVERS, *supra* note 8, at 46-48; AAMVA & AMERICAN OPTOMETRIC ASSOC., VISION SCREENING FOR DRIVER LICENSING 16 (1966).

⁴³ TESTING DRIVERS, *supra* note 8, at 48.

⁴⁴ N.Y. VEH. & TRAF. § 502 (McKinney 1960).

⁴⁵ 23 U.S.C.A. 402(2) (Supp. 1969).

⁴⁶ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

described by NHTSA, because the creation of specific standards is expressly left to each state. A host of varying state-created standards for visual acuity could be said to meet the NHTSA requirement. Consequently, the nationwide uniformity sought by Congress may be lost. The NHTSA manual amplifying its licensing standard indicates that state visual ability standards should include tests for static or dynamic visual acuity and field of vision. Applicants who fail to meet the screening standards may be referred to appropriate medical authorities.⁴⁷

Is the struggle to develop vision standards worthwhile? Is it scientifically valid to predict future driver failure on the basis of vision criteria? Unfortunately, here too, there is room for doubt. An evaluation of vision research concludes:

[P]ublished information on the relationships between visual defects and accidents is at present sparse. On the basis of this sparse information, it appears that visual defects are not strongly associated with increased accident risk. Driver compensation may be having a strong effect here. Similar statements can be applied to physical handicaps and hearing defects, where less work has been done. In fact, there may be negative correlations between these impairments and accidents, although this has not been firmly established.⁴⁸

However, there is an abundance of *opinion* as to the possible importance of visual defects in accidents, although no investigation factually relates accidents to visual capability.⁴⁹

As is the case with other applicant characteristics commonly evaluated, the questionable validity of vision as a predictor of driving success or failure again raises doubts that the rejection of license applicants on this ground is scientifically or legally justifiable.

Physical Examination

In at least two of the study states, a comprehensive approach to administrative evaluation of medical factors has been adopted. In California, for example, applicants for commercial licenses must pass a "medical examination."⁵⁰ In Pennsylvania, all school bus driver applicants must pass a "physical examination."⁵¹ The California statutes suggest the administrator may refer to the Interstate Commerce Commission standards for motor carrier drivers in establishing the medical requirements.

⁴⁷ SAFETY PROGRAM MANUAL, *supra* note 29, at 5. It should be noted that the Manual recommends screening for field of vision also, despite the fact that the formal standard is limited to visual acuity.

⁴⁸ TRAFFIC SAFETY, *supra* note 20, at 14.

⁴⁹ *Id.* at 74.

⁵⁰ CAL. VEHICLE CODE § 12804 (West 1960).

⁵¹ PA. STAT. ANN. tit. 75, § 609 (Purdon 1960). The Pennsylvania policy requiring physical examinations of all drivers is not included here because it is not a statutory policy.

Miscellaneous Characteristics

Some states require applicant evaluations in addition to those discussed. For example, California requires a test of hearing.⁵² New Jersey and Pennsylvania require knowledge of the mechanisms of motor vehicles.⁵³

Hearing defects do not appear to be strongly related to accident involvement.⁵⁴ However, AAMVA suggests that applicants with a hearing loss be restricted to the driving of vehicles equipped with an outside rearview mirror.⁵⁵ Neither NHTSA nor AAMVA recommends disqualification for a hearing loss only.

Apparently, the predictive significance of knowledge of the mechanisms of motor vehicles has not been studied.

⁵² CAL. VEHICLE CODE § 12804 (West 1960).

⁵³ N.J. STAT. ANN. § 39:3-10 (1961); PA. STAT. ANN. tit. 75, § 608(a) (Purdon 1960).

⁵⁴ TRAFFIC SAFETY, *supra* note 20, at 14.

⁵⁵ TESTING DRIVERS, *supra* note 8, at 46-48.

THE LICENSING PROCESS: DISCRETIONARY EVALUATION POLICIES 8 AND MEDICAL ADVISORY BOARDS

DISCRETIONARY EVALUATION POLICIES

Five states in the study group provide by statute that licensing authorities may consider "such other matters" or require "such further physical and mental examination" as are believed appropriate to evaluate the license applicant.¹ Florida and Ohio statutes state that applicant evaluation "shall include" specified characteristics, but they do not indicate the list to be exclusive of others.² A New York statute says an applicant "shall pass such examination as to his qualifications as the commissioner shall require."³ Another states that the applicant "shall furnish such proof of his fitness as the commissioner shall in his discretion determine."⁴

Other statutory provisions require denial of the license, for example, "when the director has good cause to believe that the operation of a motor vehicle on the highways by such person would be detrimental to public safety or welfare."⁵ Or they may require denial of the license to an applicant "afflicted with, or suffering from, a physical or mental disability or disease . . . which, in the opinion of the secretary, will prevent

¹ CAL. VEHICLE CODE, § 12804 (1960); ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966); N.Y. VEH. & TRAF. § 501(4)(b) (McKinney 1960) (learner's permit); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 (1965).

² FLA. STAT. ANN. § 322.12 (1965); OHIO REV. CODE ANN. § 4507.11 (Page 1965).

³ N.Y. VEH. & TRAF. § 501(1)(a) (McKinney 1960).

⁴ *Id.*

⁵ FLA. STAT. ANN. § 322.05(7) (1965).

such person from exercising reasonable and ordinary control over a motor vehicle. . . ."⁶

The significance of such vague language is that it empowers licensing officials to impose evaluation requirements in addition to those discussed in the previous chapter. Thus administrators may select the applicant characteristics to be evaluated, verify or assume their validity as predictors, construct an evaluation scheme, and apply it to achieve the socio-political goal of preventing driver failure.

For example, in Michigan, New Jersey, Ohio, and Pennsylvania, there is no statutory requirement that an applicant's vision be evaluated before licensing. Yet, in all of these states, licensing officials may be expected to impose vision standards. The authority to do so emanates from the broad licensing power transferred by the statutes and the power to promulgate rules and regulations to implement them.⁷ It was broad statutory language, for instance, that made it possible for Pennsylvania to require a physical examination of *all* license applicants without any legislative action.

Licensing officials of three states in the study group have established, by administrative regulation, medical advisory boards to evaluate medical factors involved in individual cases and to assist them in establishing standardized medical criteria as predictor policies. Indiana did so by statute.⁸

The danger involved in a broad power transfer that permits the administrator to create a whole range of licensing predictor policies is that he may fail to limit the predictor policies he establishes to those that predict, or relate to, human failure as a driver. It is the responsibility of the administrator to restrain himself.

Of course, statutes that transfer broad power may also establish formal controls on its use. A California statute provides that physical defects which, in the opinion of the department, are compensated shall not prevent issuance of a license.⁹ Nevertheless, it is the department that determines the question of compensation.

By implication, the California, Illinois, and Indiana statutes limit the administrator to an evaluation of applicant characteristics that are relevant to driving ability.¹⁰ Indiana requires the licensing agency to

⁶ PA. STAT. ANN. tit. 75, § 604(a)(7) (Purdon 1960).

⁷ E.g., MICH. STAT. ANN. § 9.1904(b) (1967); N.J. STAT. ANN. §§ 39:3-10.1, 11.3, 15.1 (1961); OHIO REV. CODE ANN. §§ 4501.02, 4507.01, .05, .09, .11, .21, .25 (Page 1965). The Secretary of Revenue of Pennsylvania has promulgated departmental regulations without specific statutory authority.

⁸ The three states are Florida, New Jersey, and Pennsylvania. Their programs are described in U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, MEDICAL ADVISORY BOARDS FOR DRIVER LICENSING 4-6, 58-61, 115-117 (1967). The Indiana program is described in IND. ANN. STAT. §§ 47-2727 to 2735 (Burns 1966).

⁹ CAL. VEHICLE CODE § 12804 (West 1960).

¹⁰ CAL. VEHICLE CODE § 12804 (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-109 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966).

print its rules, requirements, and regulations "which shall be uniformly and impartially followed in making such examination."¹¹

Michigan statutes provide that applicant examinations "shall not include investigation of any facts other than those directly pertaining to the ability of the applicants to operate a motor vehicle with safety. . . ." ¹² The Michigan administrator is further informed that he "shall establish rules and regulations for the examination of the applicant."¹³

The New Jersey Director of Motor Vehicles is prohibited from denying a license unless the defect can be shown by tests to incapacitate the applicant from safely operating a motor vehicle.¹⁴

In other states where broad power is transferred without control on its use, only the self-restraint of the administrator, external controls applied by the courts, and the political process are available to prevent use of transferred power to deny licenses on grounds irrelevant to operating ability and risk of driving failure. Furthermore, it should be borne in mind that the formal controls stated in the statutes may not be effective.

MEDICAL FACTORS OTHER THAN VISION

Physical Diseases

The broad scope of evaluation permitted by discretionary power grants allows administrators to disqualify applicants on medical grounds not specified in the licensing statutes.

Where it is not mentioned in the statutes, epilepsy is included in this category. In states where epileptics are denied licenses, other manifestations of loss of consciousness may be evaluated even though there is hesitancy to conclude that the condition fits the statutory label "epileptic." Likewise, alcoholism may be perceived to be a disease or a medical condition, and applicants may be evaluated in such terms although the statutory "habitual drunkard" label is not deemed to apply. Similarly, use of drugs or dependence on them short of statutory "addiction" may be considered to involve medical factors relevant to driving success or failure. Alcoholism and drug use are medically distinct from epilepsy, for they involve more than physical disease; hence they are difficult to classify accurately. Nevertheless, the licensing administrator is authorized to treat them as medical conditions for purposes of predicting future driving behavior.

Other than these medical conditions, diabetes and cardiovascular defects are the two physical diseases most commonly studied for relation-

¹¹ IND. ANN. STAT. § 47-2708(a) (Burns 1966).

¹² MICH. STAT. ANN. § 9.2009(a) (1967).

¹³ *Id.*

¹⁴ N.J. STAT. ANN. § 39:3-10 (1961).

ships to accident involvement.¹⁵ Arthritis, narcolepsy, Meniere's syndrome, and other physical conditions receive less attention.¹⁶

If he chooses to evaluate physical conditions as predictors of future driving failure, the administrator must establish the criteria, standards, and cutoff points himself. Some guidance is available from AAMVA.¹⁷ The American Medical Association has issued a publication entitled *Medical Guide for Physicians in Determining Fitness to Drive a Motor Vehicle*. It may assist the administrator to construct medical predictor policies. The NHTSA has eschewed any responsibility for constructing medical predictor policies and has, instead, included in its licensing standard a provision requiring states to create medical advisory boards to assist the administrator in establishing criteria for evaluating the medical condition of license applicants. By 1967 four states in the study group had created medical advisory boards. However, their primary function appears to be the evaluation of individual cases rather than the formulation of standardized medical criteria to be applied to all applicants.¹⁸

Dr. Julian Waller of the California Department of Public Health has compared the accident rates of California drivers known by the motor vehicle department to have various medical conditions with the accident rates of selected control groups.¹⁹ The study indicated that, except for drug users, accident rates were significantly greater for those with a medical condition under study than for the control sample. However, Waller qualifies the implication that may be drawn:

Since the present study is limited to drivers whose medical conditions were known to the department of motor vehicles, caution is urged in assuming a similar degree of driving handicap [accident rates] in unreported drivers with the same condition.²⁰

Except for alcoholism, the Waller study further revealed a very low percentage of accidents believed to be caused by a medical episode of the medical condition studied. For epilepsy, cardiovascular disease, diabetes, drug use, medical illness, and a miscellaneous category,²¹ an

¹⁵ See A. LITTLE, INC., *THE STATE OF THE ART OF TRAFFIC SAFETY* 65-71 (1966).

¹⁶ *Id.*

¹⁷ AAMVA, *GUIDE FOR THE IDENTIFICATION, EVALUATION AND REGULATION OF PERSONS WITH MEDICAL HANDICAPS TO DRIVING* (1967).

¹⁸ MEDICAL ADVISORY BOARDS, *supra* note 8, at 5, 58-59.

¹⁹ J. Waller, *Chronic Medical Conditions and Traffic Safety*, 273 NEW ENGLAND J. OF MEDICINE No. 26, at 1413-1420 (1965); A. LITTLE, INC., *THE STATE OF THE ART OF TRAFFIC SAFETY* 65-71 (1966).

²⁰ *Medical Conditions*, *supra* note 19, at 1413-1420; *TRAFFIC SAFETY*, *supra* note 19, at 66.

²¹ The miscellaneous category consisted of disorders of coordination or mobility (arthritis, Parkinson's disease, etc.), visual defects, endocrine disorders, Meniere's syndrome, mental deterioration or retardation, headache, and sinusitis.

episode of the medical condition contributed to less than 20 percent of the accidents in which each diagnostic group was involved.²² Hence, with the exception of alcoholism, the mere existence of a medical condition is a poor predictor of future driving failure.

An evaluation of this and similar studies concludes that cardiovascular disease contributes little to deaths or serious accidents on highways; the information on epilepsy and diabetes is insufficient to permit unequivocal statements concerning their role in the initiation of accidents; and, except for alcoholism, there is little evidence to suggest that other diseases contribute to traffic accidents to a large extent.²³

Once more the question arises as to the proper balance between science and law or prediction and policy. One view of what the balance should be is expressed as follows:

It is important to recognize that, as with other characteristics which might be identified as a basis for restricting driving privileges, any medical variables so chosen must be demonstrated to be highly correlated with accident risk. That is, persons so identified must be shown to have a substantially higher future accident risk than those who are not so identified. As the evidence to follow demonstrates, no medical group having such greatly increased risk has been identified, with the possible exception of those suffering from alcoholism.²⁴

A former United States Supreme Court Justice states the issue similarly, but from a legal perspective:

In a long series of cases this Court has held that, where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.²⁵

Psychiatric Diseases

Research suggests that psychoneurotic applicants have a significantly higher automobile accident rate than the general population. But it is noted that persons with such difficulties, in various degrees of severity, are common among licensed drivers. Thus, it is concluded, "as with physical diseases, the mere identification of the presence of a psychiatric disease in an individual cannot be used as a basis for license restriction."²⁶

²² TRAFFIC SAFETY, *supra* note 19, at 68.

²³ TRAFFIC SAFETY, *supra* note 19, at 71; *Medical Aspects of Driver Limitation—Special Report*, 187 J.A.M.A. 376 (1964). But see J. Waller, *Medical Impairment and Highway Crashes* 208, J.A.M.A. 2293 (1969).

²⁴ TRAFFIC SAFETY, *supra* note 20, at 65; AAMVA, *TESTING DRIVERS*, 88-89 (1967); ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, *TRAFFIC SAFETY—A NATIONAL PROBLEM* 43, 45 (1967).

²⁵ *Griswold v. Conn.* 381 U.S. 479, 497 (1965), opinion of Mr. Justice Goldberg.

²⁶ TRAFFIC SAFETY, *supra* note 19, at 72.

Physiological Impairments

Research on orthopedic handicaps indicates that drivers with physiological disabilities are not involved in accidents at a higher rate than nondisabled drivers. It is perhaps inaccurate to state that they are actually involved less frequently than the average driver. Although these drivers appear to compensate for the handicap, the available studies do not adjust for exposure. Handicapped persons may not drive as much as the average person. However, the consensus seems to be that compensated handicaps do not involve increased accident risk.²⁷

Drugs and Chemical Agents

Drugs—Objective evaluation of the role drugs play in contributing to driver failure cannot be made with confidence because the research is inadequate. However, some general observations may be made. First, use of drugs for therapeutic purposes is beneficial to the health of the driver, and their use may actually prevent far more accidents than they may produce. Insulin is an obvious example.²⁸ Second, the Waller study mentioned earlier included drug use as one of the medical conditions studied. The sample was based on records of conviction for illegal possession and use of addicting drugs and indicated a mean rate of 7.1 accidents per million miles for the drug-user group and a mean rate of 6.4 for the control group. However, Waller concluded that drug use itself was believed to contribute directly to only 10 percent of the accidents in which the drug-user group was involved.²⁹

Waller accounts for the low accident rate for illegal drug users on the basis that convictions do not distinguish between occasional users and true addicts. Furthermore, those convicted had never been evaluated for addiction severity. He believes that true addicts seldom use enough drugs at one time to achieve marked abnormal physiological responses because of their increased tolerance and the excessive cost of obtaining illegal drugs.³⁰

Carbon Monoxide and Smoking—Few studies have been made of the relationship between accidents and such chemical agents as carbon monoxide and smoking. The results of studies on atmospheric carbon monoxide are inconclusive, but apparently it is not a significant factor in accidents. Of course, exhaust leakage into the passenger compartment of a vehicle could contribute directly to an accident.

²⁷ TESTING DRIVERS, *supra* note 24, at 91; TRAFFIC SAFETY, *supra* note 19, at 76.

²⁸ W. HADDON, in ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM 12 (1967).

²⁹ MEDICAL CONDITIONS, *supra* note 19, at 1413-1420; discussed in TRAFFIC SAFETY, *supra* note 19, at 68, 78.

³⁰ MEDICAL CONDITIONS, *supra* note 19, at 1413-1420; discussed in TRAFFIC SAFETY, *supra* note 19, at 79.

The effect of smoking is, likewise, uncertain on the basis of existing research. However, it has been shown that smokers who were deprived of smoking made more tracking and vigilance errors in a driving simulation test than either nonsmokers or smokers who were not deprived. The deprived smoker group also demonstrated a significant increase in aggression.³¹

Summary—The Arthur Little team that evaluated research on drugs and chemical agents stated:

Although the area of automobile accident research in general abounds with suppositions, the literature gives no data which would allow a responsible evaluation of the role that therapeutic drugs may play in contributing to or in fact preventing automobile accidents.³²

After pointing out that illegal drug users do not have a significantly poorer accident record than the general population, they conclude:

Efforts to resolve these questions, especially in the area of drugs, are needed. This is particularly important since the literature, in so many cases, is dogmatic and misleading. Such presentations are easily misinterpreted and could possibly lead to programs likely to do no more than place unnecessary impositions upon various elements of the population.³³

Alcohol and Accidents

Alcoholism constitutes the single striking exception to the research conclusions as to the relationships between medical factors and accident involvement. The Waller study indicated that more than 50 percent of the accidents incurred by the chronic alcoholic group were believed to have been caused by the medical condition itself. In no other diagnostic category were as many as 20 percent of the accidents believed to have resulted from the medical condition.³⁴ Waller suggests elsewhere that from 30 to 70 percent of all alcohol-involved accidents are incurred by alcoholics rather than social drinkers. He warns, however, that we should not rush to place all blame for such accidents on alcoholics, as it was previously placed on social drinkers.³⁵

A group of three studies of the blood alcohol concentrations of fatally injured drivers in accidents of all types indicates that from 55 to 64 percent of them had detectable blood alcohol concentrations. Three

³¹ N. Heimstra, N. Bancroft, A. Dekock, *Effects of Smoking on Sustained Performance on a Simulated Driving Task*, in CONFERENCE ON THE EFFECTS OF NICOTINE AND SMOKING ON THE CENTRAL NERVOUS SYSTEM, NEW YORK ACADEMY OF SCIENCES (1966).

³² TRAFFIC SAFETY, *supra* note 19, at 81.

³³ *Id.*

³⁴ *Id.* at 67-68.

³⁵ J. Waller, 4th International Conference on Alcohol and Traffic Safety, Indiana University (1965); discussed in TRAFFIC SAFETY, *supra* note 19, at 92.

studies of the alcohol concentrations of fatally injured drivers involved in single-vehicle accidents only indicate that from 71 to 83 percent had detectable blood alcohol concentrations. In each study, more than 50 percent of the detectable concentrations were in excess of 0.05 percent.³⁶ Some researchers suggest that medical impairment begins at this level, despite the fact that the *legal* presumption of intoxication may begin at the level of 0.10 or 0.15 percent.

It is the high frequency of detection of blood alcohol concentrations among accident-involved drivers as contrasted with the low frequency of detection of blood alcohol concentrations among non-accident-involved control groups which indicates that alcohol plays a contributory role in traffic accidents. Dr. William Haddon, former Administrator of NHTSB, and Dr. Waller have suggested that it may be possible to concentrate our safety efforts on the pathological drinker and the chronic alcoholic rather than the social drinker in our attempts to reduce alcohol-related accidents.³⁷ Haddon cautions, however, that this is probably the most difficult group to influence. Furthermore, it is difficult to distinguish between infrequent heavy social drinking and chronic alcoholism in terms of accident involvement, for high blood-alcohol concentrations are dangerous in either circumstance.

As Dr. Waller warned, we should not make the mistake of shifting licensing controls from one drinking extreme to the other. A balanced approach, with emphasis on grossly aberrant drinking behavior, seems to be dictated. Intensive study of alcoholism and its treatment is justified on the evidence available as a potential means of reducing the highway death toll.

MEDICAL ADVISORY BOARDS

The fact that laymen administrators have come to recognize their professional limitations as evaluators of applicant medical characteristics has led some of them to establish medical advisory boards to assist in making licensing decisions and in creating medical predictor policies. Florida, Indiana, New Jersey, and Pennsylvania are states in the study group that had established such boards when this analysis was made.³⁸

The premises on which such boards are created are obvious. The assumption is made that medically trained persons may more accurately assess the accident risk created by the medical characteristics of individual license applicants. Furthermore, medical board members are assumed to have the competence to assist the administrator in creating medical

³⁶ Studies discussed in *TRAFFIC SAFETY*, *supra* note 19, at 84-85.

³⁷ *NATIONAL PROBLEM*, *supra* note 28, at 12; J. Waller in *TRAFFIC SAFETY* *supra* note 20, at 86; R. Cramton, in *INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT* 202 (1968).

³⁸ *MEDICAL ADVISORY BOARDS*, *supra* note 8, at 4-13, 64-88, 115-133; *IND. ANN. STAT.* §§ 47-2727 to 2735 (Burns 1966).

standards, criteria, and cutting scores for use as general predictor policies in the driver selection process. The administrative scheme, therefore, involves medical boards in both case-to-case decisions and in general policy making.

However, there is reason to question the validity of these premises. First, it is apparent from the research literature concerning medical factors that, with the exception of alcoholism, there is no evidence of a significant difference in accident rates for most types of medical conditions when compared to the accident rates of the general driving population. Nevertheless, the medical board concept is based on the assumption that medically trained personnel may actually make a scientific prediction that an applicant will succeed or fail as a driver. No doubt this judgment may best be made by medically trained persons, but it should be recognized that they, too, are unable to apply scientific measures to medical characteristics. Physicians on medical boards do nothing more than make educated guesses when they evaluate license applicants. Certainly an educated guess is to be preferred, but it is still nothing more than a guess. In 1959 the American Medical Association issued a publication for the guidance of physicians asked to determine the fitness of persons to drive.³⁹ However, intervening medical factor research may cast doubt on the reliability of some of its recommendations.⁴⁰

Second, physicians on medical boards are unable to describe general medical criteria and standards that may be adopted by the licensing agency as valid predictor policies. The medical research knowledge base is not adequate. Medical predictors established by a licensing agency in consultation with a panel of experts will, therefore, be of doubtful predictive utility until validated by controlled research studies. Nonetheless, medical experts are knowledgeable, and their judgments on such matters are more likely to be rationally related to the prevention of human failure while driving. Laymen administrators may be too easily misled by dogmatic literature, "folklore," or the simplistic arguments of a self-styled safety expert. Presumably, a group of physicians would be more sophisticated and could make more objective judgments.

Third, another type of question may be raised as to validity of the judgment of medical boards. Do the board members have a working knowledge of the medical factors research that has been done in the highway accident field? The studies in this field are not widely circulated or published and may not be available to board members unless copies are furnished by the licensing agency.

Where medical board members are not familiar with the existing accident research, or if they are familiar with it but refuse to accept the findings, the purpose of the medical board may be defeated. The danger lies in the fact that the uninformed or opinionated board member

³⁹ AMERICAN MEDICAL ASSOC., MEDICAL GUIDE FOR PHYSICIANS IN DETERMINING FITNESS TO DRIVE A MOTOR VEHICLE (1959).

⁴⁰ See, e.g., DRIVER LIMITATION *supra* note 23, at 376.

may confidently assume his own "folklore" ideas of the relevance of medical factors to accidents to be scientifically valid. For instance, he may feel quite strongly that no narcotics user should drive. This judgment, based on his personal value scheme and experience, would be of questionable scientific validity. If the majority of the board members share the same opinion, the narcotics user will be denied a license on a purely putative medical judgment. The Waller research findings questioning the assumed relevance of drug use to accident involvement will have been ignored.⁴¹

The predictive advantage sought by the creation of the board may thus be turned, instead, into a sociopolitical disadvantage. The uninformed or opinionated board members will have disregarded their medical prediction function and will have made pseudo-medical recommendations and evaluations on the basis of unscientific, personal value schemes.

Thus, there is danger of creating an administrative medical board facade that gives the impression that licenses are granted or denied on the basis of medical prediction when they actually are based on sociopolitical considerations. As sensible as the use of medical boards may appear, it is clear they have their limitations, and unless controlled they may pose a threat to the interests of the individual who desires to drive a motor vehicle.

First, there is danger that the licensing recommendations of medical boards may be accepted at face value and presumed to be based on reliable scientific knowledge. Will not administrators and judges hesitate to overrule the licensing recommendations of a board of medical "experts"? But if administrators and courts do not scrutinize medical board recommendations, recognition of their inability to predict driving behavior accurately on the basis of medical factors suggests the questions: Who in government will protect the interests of the license applicant who is in the awkward position of having to attack an "expert" recommendation? What may he say in his behalf that will be heard by the administrator or the court? His position is especially difficult if the board merely states its conclusions. Unless medical boards justify their opinions by articulating the criteria and standards on which these conclusions are based, no effective attack may be made.⁴²

Second, there is danger that general medical predictor policies (recommended by a medical board) may be evaluated by administrators and courts in a perfunctory manner, if at all. Are general medical predictors adopted as program policies to be treated as beyond question because they were conceived by a group of medical "experts"? Is a "rational relationship" between medical predictor policies and prevention of

⁴¹ *TRAFFIC SAFETY*, *supra* note 19, at 68, 78.

⁴² *E.g.*, *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), *rehearing denied* 330 F.2d 55 (5th Cir. 1964). The court forced a liquor licensing agency to articulate its decision criteria.

driving failure to be assumed without question if the predictor policies are given the imprimatur of a medical board? If there are conflicting research findings, will they be considered by administrators and courts?

Although administrators are to be commended for establishing medical advisory boards, it should be recognized that they are no panacea for a medical evaluation of license applicants. Medical boards are not a ready source of medical criteria and standards that may be adopted as scientifically reliable predictor policies for licensing. However, their opinions offer a safety potential that should not be rejected out of hand, provided they are subject to evaluation. A summary of medical board structures and methods in four of the states having them follows.

Medical Advisory Boards in the Study States

Florida, New Jersey, and Pennsylvania establish their systems of medical board evaluation by making use of their express or implied authority to promulgate rules and regulations to implement the driver licensing statutes.⁴³ Indiana did so by statute.⁴⁴ Thus, in three states the licensing administrators actually "made the law" through the rule-making process. The use of rule-making power by these states should serve to illustrate the point made earlier that administrators usually possess sufficient power to adopt by rule or regulation most licensing program policies that are needed. They do not need additional legislation in most instances. But administrators must come to recognize that they are the real power wielders, and they must begin to accept the responsibilities that accompany their power. The potential for creative licensing program action is present if administrators are willing to act dynamically. Likewise, the NHTSA should recognize the rule-making power of licensing administrators and insist that compliance with its standards may be achieved by adoption of agency rules without awaiting legislative action. In fact, the NHTSA licensing standard requires states to create systems for medical evaluation of individual drivers and medical boards to assist in establishing standardized medical criteria and vision standards. Other states could do well to emulate the actions of Florida, New Jersey, and Pennsylvania and comply with the NHTSA standard through their rule-making processes. Of course, the prompt action of the Indiana General Assembly is equally acceptable.

In their review of specific cases the services of the medical advisors may be used to evaluate both initial applicants and licensed drivers whom the agency suspects of being poor driving risks because of medical factors. For the most part the advisor groups have been used to evaluate licensed drivers whom the licensing agency believes are potentially un-

⁴³ FLA. STAT. ANN. §§ 322.02, 322.27(2)(i) (1965); N.J. STAT. ANN. §§ 39:3-10.1, 39:3-11.3, 39:3-15.1 (1961). The Secretary of Revenue of Pennsylvania has promulgated departmental regulations without specific statutory authority.

⁴⁴ IND. ANN. STAT. §§ 47-2727 to 2735 (Burns 1966).

acceptable licensing risks. Where a licensing examiner detects a medical condition, the applicant is referred to the medical advisory body for evaluation. Other sources of information leading to referral might be friends, family, or neighbors; reports from law enforcement agencies; courts; and accident reports. Manifestly, the medical evaluation machinery remains inoperative until agency detection occurs and a specific referral is made. The utility of medical evaluation will thus depend on the actions of the agency, and where original applicants are involved detection of medical conditions may prove to be difficult.⁴⁵ Hence, most medical board evaluations are of persons licensed but suspected to be unacceptable driving risks.

The available data do not indicate that these states have used their medical advisors to assist in the development of general medical criteria to be used as predictor policies, although the NHTSA driver licensing standard contains this requirement.⁴⁶ The Indiana statute imposes this responsibility on the Medical Advisory Commission.⁴⁷ Perhaps this task is now under way.

Pennsylvania is unique among the study group states, for it requires a medical evaluation of all original license applicants and all drivers every 10 years. Although an original applicant has been previously licensed elsewhere, he must undergo a medical evaluation to qualify for a Pennsylvania license.

A Conclusion and a Suggestion

Although it may be difficult to create medical criteria that predict human failure, if government uses medical conditions as licensing predictor policies, the criteria should be articulated precisely and should be made public. Doing so allows them to be applied uniformly by physicians and medical boards, applied and evaluated in agency appeal processes, and evaluated as to their sociopolitical acceptability by courts that review agency licensing decisions.⁴⁸ However, this has not been done.

⁴⁵ See *TESTING DRIVERS*, *supra* note 24, at 94, 96.

⁴⁶ See *generally* *MEDICAL ADVISORY BOARDS*, *supra* note 8; National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

⁴⁷ IND. ANN. STAT. § 47-2727 (Burns 1966).

⁴⁸ For a similar approach, see *generally* K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

THE LICENSING PROCESS: SUMMARY OF EVALUATION POLICIES 9 AND LICENSE ISSUE AND RENEWAL

SUMMARY OF APPLICANT EVALUATION

As has been seen, the essence of the process of initial licensing consists of the evaluation of applicants according to a series of predictor policies. Some of the predictor policies are established by the legislature and are applied ministerially. Minimum age limits are an example. In most instances, however, it is the task of the agency to construct the specific predictor policies to be used. To do so is the essence of the administrative process and serves to establish beyond peradventure that agencies make the "law" of driver licensing.

Various characteristics of applicants are evaluated as predictors of future success or failure as a driver. Among these are driving skill, ability to understand traffic control devices, and knowledge of traffic laws. Unfortunately, the research literature suggests that all are low-validity predictors.

In addition to physical driving skills and general knowledge, it is customary to evaluate applicants on the basis of medical conditions. Originally, licensing statutes declared ineligible those persons suffering from conditions such as epilepsy, habitual drunkenness, narcotics addiction, adjudication of mental incompetence, or unacceptable visual ability. In recent years, medical evaluations have become more comprehensive and may include cardiovascular conditions, loss of consciousness, diabetes, or other ailments. However, with the exception of alcoholism, medical conditions are also poor predictors of driver behavior.

The nature and extent of applicant evaluation varies from state to

state, but it occurs in all 10 study group states. A poor rating on one or more of several predictors may result in denial of the license.

Considering the low validity of virtually all commonly used predictor policies, denial of the license to the vast majority of applicants would appear to be of little significance in reducing highway accidents resulting from human failure. Correspondingly, opposing sociopolitical pressures to obtain the license are enhanced by the knowledge that much of the sound research literature indicates that driver selection-prediction is no more than educated guesswork. A society that is heavily dependent on the automobile as a primary mode of movement may well question the desirability of licensing policies that masquerade as scientific prediction and purport to perform a socially useful function but fall short of the mark.

In legal terms such a discussion ultimately leads to a charge of "injustice." This word implies that licensing predictor policies, because of their slight scientific validity, do not rationally relate to the licensing goal of preventing human failure. They may be held to be illegal because they are too oppressive. Their effects on the individual interest in efficiency and convenience are too great for the limited social benefits they provide. Highly valid predictor policies would shift the balance and argue for continuation of their use, for there would be reason to assume there is sufficient safety payoff to justify the cost. Unfortunately, such is not the case.¹

Therefore, a public control versus private interest tension is created in the driver licensing process, and "law" is asked to adjust that tension. When tension was slight (horse and buggy days), no one really cared what happened to the users of automobiles, for society used other modes of movement. But when the motor vehicle becomes a primary mode of movement for a broad spectrum of society, the tension increases unless government is able to justify the controls it applies. It would seem there is currently a state of high tension. Perhaps it is simplistic to assume that courts and statutes are the proper agents for adjustment of the tension. It may be possible for the licensing agency to reduce the tension to a manageable level. Restricted licensing is one possible administrative approach to tension reduction.

EXPANDED USE OF RESTRICTED LICENSING—A SUGGESTION

Unless limited to an either-or choice, medical boards may prefer, where appropriate, to suggest a form of restricted license compatible with the medical condition of a particular applicant rather than recommend denial. Likewise, the licensing examiner may consider an applicant unacceptable for unlimited licensing but acceptable with restrictions

¹ W. HADDON, ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, *TRAFFIC SAFETY—A NATIONAL PROBLEM* (1967); R. Cramton, in *INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT* 211 (1968).

such as no night driving (vision), no freeway driving (driving skills), driving only while accompanied, or some similar limitation.

Through use of their statutory power grants all licensing agencies in the states studied appear to have the authority to establish comprehensive restricted licensing programs.² Most of the statutes vest broad discretion in licensing agencies to devise appropriate licensing restrictions of all types. Coupled with their rule-making power, agencies may create comprehensive restricted licensing programs without legislative action, just as three of the study states created medical advisory boards.

One of the assumptions on which licensing is based is that people who are not licensed, who are denied the license, or whose licenses have been withdrawn do not in fact drive motor vehicles. If this premise is invalid, the whole concept of licensing is fallacious. There is some evidence the premise is, indeed, partially invalid.³ Perhaps most persons who are not licensed do not drive, but apparently there are many who do. Why they do is not known, but it may be speculated that they know other persons with similar skill deficiencies, similar visual impediments, and similar medical conditions but who are licensed and who do not become involved in accidents. Furthermore, the extreme social pressure—the need, the desire—to be able to move about efficiently may dictate that the automobile is the appropriate mode and the risk of getting caught is worth taking. Possibly Americans may feel they lose part of their individuality if herded into mass transit vehicles like so many sheep. Hence, there is a romance with the motor vehicle.

It is this sort of disregard of the law that might be corrected by restricted licensing. To be told that one cannot drive at all creates extreme tension between public control and private interest. The legitimacy of the reason for being denied driving privileges does not alleviate the social pressures generated by the decision. Whatever the reason for the denial, it may be perceived by the individual to be unjust and unacceptable for its interference with the enjoyment of driving-related social interests he perceives to be legitimate. And he may have concluded by intuition and observation that accurate driver selection-prediction through licensing is poorly done, if done at all!

To be told that one may drive, but with limitations, is an entirely different matter and perhaps worthy of further investigation as a means of securing more effective control over the driving public—part of whom may be presumed to be driving illegally. A restricted license permits the enjoyment of some driving-related social interests and affords recog-

² CAL. VEHICLE CODE § 12813 (West 1960); FLA. STAT. ANN. § 322.16, .21 (1965); ILL. ANN. STAT. ch. 95½, § 6A-111, 113 (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-2708(F), 47-2711(C) (Burns 1966); MICH. STAT. ANN. § 9.2012 (1967); N.J. STAT. ANN. § 39:3-11 (1961); N.Y. VEH. & TRAF. §§ 501(1)(a), 501(8), 501(9) (McKinney 1969); OHIO REV. CODE ANN. §§ 4507.14, 4507.20 (Page 1965); PA. STAT. ANN. tit. 75, § 608(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 12(a) (1965).

³ DRIVER BEHAVIOR, *supra* note 1, at 60, 118.

nition to the desire for individuality in a mass society. Accordingly, restricted licensing may reduce some of the tension that denial or withdrawal creates. Reduced tension could, in turn, lessen the felt need to disregard the driver control system and drive illegally. In short, restricted licensing offers an alternative. It permits escape from a socio-legal dilemma confronting the individual that may not be fully recognized by sociolegal policy makers. Thus, an accommodation of licensing agency interests and the individual interests of the unsuccessful applicant through license restrictions may be a more realistic and more effective means of controlling driving behavior than imposition of the extreme sanctions currently applied.⁴ Particularly could this be justified in view of the fact that licensing predictor policies are of such limited scientific validity. Government should not resist limited licensing by refusing to accept the fact that its predictors are poor. Instead, government should come to understand that it may be expecting too much of driver licensing as a safety measure based on current knowledge. Hence, massive restricted licensing is not necessarily as fraught with public danger as might be assumed.

Scientifically, only the pathological drinker group has been shown, with some degree of accuracy, to be predictably involved in fatal accidents. Therefore, denial of the license may be legally justifiable because there is some confidence that the predictor policy is valid. Extreme sanctions may be the only acceptable policy commensurate with the risk these persons constitute as drivers. The research literature similarly supports strong measures to control excessive social drinking while driving because of its known relation to accident involvement. The difficulty is devising effective control measures, but adoption of implied consent statutes accompanied by appropriate publicity may afford sufficient control.⁵

Until something similar to the limited or restricted licensing concept is applied in driver selection systems, applicants who are denied licenses will be forced to seek agency or court review of the decision in an attempt to overturn it. Or they may choose to be reevaluated at a later date, if the reason for the denial is lack of knowledge or skill or if a previous medical condition has been eliminated or corrected. Most states permit several attempts to qualify for a license; thus in many instances no immediate review is sought.⁶ It is said that visual defects or other physical deficiencies constitute the bulk of the immediate appeals.⁷

⁴ *Id.* at 115.

⁵ See H. ROSS, D. CAMPBELL, G. GLASS, UNIVERSITY OF COLORADO LABORATORY OF EDUCATIONAL RESEARCH, *THE BRITISH CRACKDOWN ON DRINKING AND DRIVING: A SUCCESSFUL LEGAL REFORM* (1969). The British Road Safety Act of 1967 is similar to American "implied consent" statutes.

⁶ *Contra*, N.Y. VEH. & TRAF. § 501(1)(c) (McKinney 1960). New York permits only one attempt to pass the road test.

⁷ AAMVA, *TESTING DRIVERS* 52 (1967).

ORIGINAL LICENSE ISSUE

After having been selected as an acceptable driving risk by the licensing agency, the applicant begins what is normally a lifetime of motor vehicle operation. If he is not subjected to some type of periodic reassessment and reselection, the licensee is admitted to the driving society for better or worse and the driver selection system has performed only a limited safety function. Hence, some method of follow-up control is essential if the licensee is to be regulated throughout his driving career.

Statutory License Term

The most obvious form of control mechanism is to limit the period of validity of the license and require its periodic renewal. All states in the study group issue specific term licenses that must be renewed upon expiration.⁸ Thus, all are in compliance with the NHTSA licensing standard that requires specific term licensing and periodic renewal.⁹ For the ordinary operator's license, the original license term varies from a minimum of 1 year in New Jersey (or 3 years at the option of the applicant) to a maximum of 4 years in Texas.¹⁰ The expiration may be based on the issue date, the last day of the month of birth, or the birthday of the licensee. In all the study states, there is an ascertainable beginning and terminating date for licenses. For chauffeur and commercial licenses or learner's permits the period of validity is generally shorter than for the operator's license but is also a determinate time.

Renewal licenses are generally issued for the same term as the original, but in California the renewal is normally for 4 years, whereas the original license term is 3 years.¹¹

Formalistic-Discretionary License Term

In most states the administrator has little or no choice as to the term of the license, for the statutes are specific. However, there are some exceptions.

In California, for example, the department of motor vehicles is instructed to renew licenses for 3 instead of 4 years if the applicant has incurred three or more traffic violations or if convicted of "any felony" in which a motor vehicle was used. Determining whether a motor vehicle was used in the commission of the felony is apparently within

⁸ U.S. DEP'T OF TRANSPORTATION, table DL-101 (1968).

⁹ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

¹⁰ N.J. STAT. ANN. § 39:3-10 (1961); TEX. REV. CIV. STAT. ANN. art. 6687b, § 18(a)(1) (1965).

¹¹ CAL. VEHICLE CODE § 12816 (West 1960).

the authority of the department.¹² How the determination is made is not known.

In Illinois, if the applicant was not previously licensed in that state, the agency may issue the license for a period not less than 3 nor more than 4 years from date of issue.¹³

In New Jersey, the director has the authority to issue the license "at his discretion and for good cause shown" for a determinate period of between 5 and 41 months.¹⁴

New York authorizes the licensing commissioner to establish the term of licenses for a determinate period of between 24 and 36 months.¹⁵

With the approval of the governor, the Pennsylvania licensing agency may extend the term of a license for up to 30 days.¹⁶

Discretionary License Term

In none of the study states does the licensing authority have complete discretion to establish the term of licenses. To some extent statutory license terms are specified in all of them.

LICENSE RENEWAL REQUIREMENTS

Formalistic-Discretionary Reexamination Requirement

The NHTSA standard requires reexamination of licensees at intervals not in excess of 4 years for at least visual acuity and knowledge of rules of the road.¹⁷ Normally the reexamination occurs at the time of license renewal.

Of the study states, Florida, Illinois, Indiana, Michigan, and New York have enacted requirements for reexamination. The Florida reexamination is administered every 4 years and "shall include" a test of (a) "eyesight," (b) "hearing," and (c) "ability to read and understand highway signs." If the statutory phrase "shall include" is construed to permit the department to evaluate other characteristics, reassessing knowledge of rules of the road would bring Florida into compliance with the NHTSA standard. The Florida mandatory reexamination requirement became effective July 1, 1970.¹⁸

Illinois requires a reexamination at each license renewal of licensees

¹² *Id.*

¹³ ILL. ANN. STAT. ch. 95½, § 6A-115 (Smith-Hurd 1958).

¹⁴ N.J. STAT. ANN. § 39:3-10 (1961).

¹⁵ N.Y. VEH. & TRAF. § 501(1)(c) (McKinney 1960).

¹⁶ PA. STAT. ANN. tit. 75, § 615 (Purdon 1960).

¹⁷ National Highway Safety Standard No. 5, Driver Licensing 23 C.F.R. subpart B, § 204.4 (1969).

¹⁸ FLA. STAT. ANN. § 322.121 (1965).

age 69 or older, and a reexamination of other licensees at least every 9 years. It "shall include" a test of (a) "eyesight," (b) "ability to read and understand highway signs," and (c) "knowledge of the traffic laws." The secretary of state is given specific authority to implement the reexamination requirement by promulgating rules. Accordingly, he may structure a reexamination that complies with the NHTSA standard.¹⁹

Indiana requires a reevaluation every 4 years. It "shall include" a test of "eyesight" and "knowledge of traffic laws" and appears to be in compliance with the NHTSA standard.²⁰

In Michigan the agency is required to reexamine applicants for renewal of operator's licenses who have suffered physical impairment, have a "bad driving record," who are not validly licensed, or if it is apparent from the physical condition of the applicant that he is not qualified.²¹

The New York statute makes mandatory a vision check every 9 years to meet standards established by the commissioner. The commissioner is required to implement this provision by establishing appropriate regulations.²²

In all these states the licensing authority has the power to devise the content of the examination required and establish cutoff scores. The statutes specifying licensee characteristics to be reevaluated are not precise, and, with the exception of New York, do not appear to exclude other characteristics that the administrator may desire to evaluate.

The reexamination requirement in these states forces some degree of agency surveillance of licensees throughout their driving careers.

Discretionary Reexamination

The statutes of six of the study states may be construed to grant the administrator authority to establish a periodic licensee reexamination program if he chooses to do so. Furthermore, the programs could probably be established without additional legislative action. Hence, there could be immediate compliance with the NHTSA reexamination standard, unless budgetary needs are increased thereby and an additional appropriation cannot be obtained. The California, Illinois, and Texas statutes specifically confer authority on the administrator to require a renewal examination,²³ whereas the Ohio, Michigan, and Pennsylvania statutes authorize the licensing authority to "waive" examination on renewal.²⁴ By simply determining not to "waive" the reexamination the agency could establish a program.

¹⁹ ILL. ANN. STAT. ch. 95½, §§ 6A-109, 6A-115(b) (Smith-Hurd 1958).

²⁰ IND. ANN. STAT. § 47-2708(i)(g) (Burns 1966).

²¹ MICH. STAT. ANN. § 9.2009(b) (1967).

²² N.Y. VEH. & TRAF. § 501(9) (McKinney 1960).

²³ CAL. VEHICLE CODE § 12814 (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-115 (Smith-Hurd 1958); TEX. REV. CIV. STAT. ANN. art. 6687b, § 18(d,e) (1965).

²⁴ OHIO REV. CODE ANN. § 4507.10(B) (Page 1965); MICH. STAT. ANN. § 9.2009 (1967); PA. STAT. ANN. tit. 75, § 608(c) (Purdon 1960).

In New York the authority to create a comprehensive reexamination program, in addition to the mandatory vision check, is not clear and arises only by implication from statements in the statutes authorizing the Commissioner to refuse renewal of a license if the applicant is not deemed qualified.²⁵ Nevertheless, this power base appears to be sufficient to support a reexamination program if implemented by agency regulations.

New Jersey is unique among the study states, for its statutes impliedly prevent a periodic reexamination of licensees by requiring renewal to be accomplished by mail.²⁶ On the other hand, New Jersey statutes vest broad discretion in the director of motor vehicles to refuse a license to one who is deemed "not a proper person" to be licensed because of inability to operate a motor vehicle safely. If necessary, the periodic reexamination could be required at some time other than renewal. Perhaps the division of motor vehicles could order periodic reexamination on the power base used to establish its "for cause" medical panel examination system. However, periodic reexamination of *all* licensees and "for cause" reexaminations of *individual* licensees must not be confused. Of course, a statutory amendment would remove any legal impediment to periodic reexamination in New Jersey.

Administrative Reexamination Programs—Administrative rule-making power is the mechanism through which agencies in most of the study states could structure a comprehensive licensee reexamination program. At least eight of the study states have, by statute, vested rule- or regulation-making power in driver licensing administrators.²⁷ In Pennsylvania and Texas there does not appear to be specific rule-making authority for licensing, but it may be implied. In effect, Pennsylvania used rule-making power to establish its physical examination requirements and create its medical advisory board. A precise statutory grant of rule-making power is desirable but is not necessarily a legal requirement.²⁸

Furthermore, the statutory definition of administrative "rule" or "regulation" is sufficiently broad in seven of the study states²⁹ to permit administrative adoption of reexamination policies in the form of rules or regulations. Obviously, their reexamination programs could be tailored to meet or exceed NHTSA standards. However, a restrictive court in-

²⁵ N.Y. VEH. & TRAF. § 501(5) (McKinney 1960).

²⁶ N.J. STAT. ANN. § 39:3-10 (1961).

²⁷ CAL. VEHICLE CODE § 1651 (West 1960); FLA. STAT. ANN. §§ 322.02, 322.27(2)(i) (1965); ILL. ANN. STAT. ch. 95½, §§ 6A-109(a), 6A-211 (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-2705, 47-2708, 47-2910 (Burns 1966); MICH. STAT. ANN. § 9.1904(b) (1967); N.J. STAT. ANN. §§ 39:3-10.1, 39:3-11.3, 39:3-15.1 (1961); N.Y. VEH. & TRAF. §§ 207(3), 215 (McKinney 1960); OHIO REV. CODE ANN. §§ 4501.02, 4507.01, 4507.05, 4507.09, 4507.11, 4507.21, 4507.25 (Page 1965).

²⁸ F. COOPER, STATE ADMINISTRATIVE LAW 176-177 (1965).

²⁹ CAL. GOVERNMENT CODE § 11371(b) (West 1966); FLA. STAT. ANN. § 120.021(2) (1965); ILL. ANN. STAT. ch. 127, § 264 (Smith-Hurd 1958); IND. ANN. STAT. § 60-1503 (Burns 1966); MICH. STAT. ANN. § 3.560(7) (1967); OHIO REV. CODE ANN. § 119.01(c) (Page 1965); PA. STAT. ANN. tit. 71, § 1710.2(e) (Purdon 1960).

interpretation of the licensing statutes could hamper or prevent administrative establishment of the program, despite the court's recognition of broad agency authority to adopt rules or regulations.

New Jersey and New York did not define "rule" or "regulation" by statute. Nonetheless, the administratively created New York traffic conviction point system suggests that agency rule power is read broadly in those states.³⁰

The Texas statutory definition of "rule" is extremely narrow and excludes the substantive rules with which we are now concerned.³¹ However, the narrow definition is for purposes of that particular legislative enactment and does not necessarily negate the fact that substantive rule making occurs in agencies. In fact, a later portion of the same statute expressly recognizes that agencies make substantive rules.³² Hence, it is probable that the express transfer of discretionary power to require a licensing reexamination is sufficient to justify its implementation by agency rules.

Policy Considerations—The subtle pressures created by the NHTSA standard, accompanied by the potential loss of federal highway safety funds for failure to comply, may dictate the state's policy choice by forcing adoption of periodic reexamination programs.³³ However, a periodic reexamination is not likely to be any more valid as a predictor of driver behavior than the original examination. If anything, reexaminations may be less effective as predictors because they are less comprehensive.

On the other hand, reexamination affords a further opportunity to implement the restricted licensing program suggested as an acceptable alternative to the application of severe sanctions. In addition, a driver experience file will have been created in the licensing agency. A periodic reexamination would permit continuation, removal, or adjustment of previously imposed license restrictions or the addition of other limitations. Periodic reexamination permits both licensee characteristics and the individual record of driving behavior to be evaluated in a single transaction.

Unfortunately, it may not be politic to establish reexamination programs administratively because of the danger of lack of legislative support. Unless the present staff and facilities are sufficient for the task, a periodic reexamination program will require additional budget appropriations. State legislatures may not be willing to provide the necessary funds until the NHTSA pressure is more keenly felt in legislative councils. Hence, administrators may justifiably hesitate to embark on

³⁰ Cf. *Allen v. Strelecki*, 50 N.J. 410, 236 A.2d 129 (1967); *Ross v. Macduff*, 309 N.Y. 56, 127 N.E.2d 806 (1955).

³¹ TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(b) (1965).

³² TEX. REV. CIV. STAT. ANN. art. 6252-13, § 5 (1965).

³³ Secretary Volpe (Dep't of Transportation) indicated recently that states which do not comply with the NHTSA standards may, indeed, lose federal funds. See *Safety Hassle*, *The Wall Street Journal*, June 16, 1969, at 1.

such ambitious programs until assured they will be supported. If NHTSA were to insist on immediate compliance with its reexamination standard through administrative rule making, state legislatures might be sufficiently impressed to provide funds immediately.

Summary of the License Renewal Process

As is apparent from the foregoing discussion, the state licensing renewal process may vary between the extremes of simplistic mail-order relicensing on the one hand and a comprehensive physical examination and retesting on the other. Certainly, mail-order license renewal accomplishes nothing for safety and serves primarily as a source of state revenue. Even so, mail-order renewal may alert the licensing agency to check the applicant's driving record for aberrant behavior that justifies a "for cause" evaluation of the individual licensee. The NHTSA standard requires a licensee driving record check at each license renewal. The significant question is, What constitutes such a "check"? The NHTSA manual does not provide an explanation.³⁴ Obviously, the record "check" or screening may therefore vary greatly from state to state.

If the NHTSA standard is ultimately met by all states, periodic reexamination will become a part of the license renewal process. As the research knowledge base grows, additional NHTSA standards may require further modification in the scope of the reexamination and the criteria used as driver behavior predictors.

The renewal process may also be put to good use as an opportunity to reevaluate previously imposed restrictions and, perhaps, impose more or different driving limitations. Of the 10 study states, only the New York statutes specifically confer authority to impose license restrictions at the time of reevaluation. After the mandatory periodic reexamination of vision, the commissioner of motor vehicles may impose license restrictions.³⁵ The statutes of the other states do not precisely convey such power, but phrases such as "whenever good cause appears"³⁶ or similar language conferring power to restrict original licenses would appear to be broad enough to permit the imposition of restrictions on renewal licenses as well.

Various combinations of transferred licensing authority and rule-making power offer opportunities for creative development of more comprehensive driver selection systems by licensing authorities. It is apparent that much may be done without awaiting legislative action. Licensing agencies have POWER; will they act to establish POLICY?

³⁴ U.S. DEP'T OF TRANSPORTATION, HIGHWAY SAFETY PROGRAM MANUAL, VOL. 5 DRIVER LICENSING 9 (1969).

³⁵ N.Y. VEH. & TRAF. § 501(9) (McKinney 1960).

³⁶ E.g., CAL. VEHICLE CODE § 12813 (West 1960); FLA. STAT. ANN. § 322.221 (1965); ILL. ANN. STAT. ch. 95½, § 6A-113 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708(F) (Burns 1966); N.J. STAT. ANN. § 39:3-11 (1961); OHIO REV. CODE ANN. § 4507.20 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b, § 12(a) (1965).

10 WITHDRAWAL OF LICENSES: INTRODUCTION

The driver selection-prediction systems of all states in the study group attempt to maintain surveillance of drivers who have been identified as acceptable driving risks. This is generally accomplished by monitoring driver record files in the licensing agency. Information is collected on drivers from reports of convictions of traffic violations, medical reports of physicians, accident reports, and complaints from law enforcement officers, relatives, and friends.¹ Previously determined predictor policies are applied to the records of licensees, and those who fail to maintain acceptable driving standards are ultimately selected for license withdrawal action. Intermediate steps may consist of requiring a licensee to submit to a reexamination of his qualifications² or an examination by a medical advisory board.³ The results may be used to justify license withdrawal or the imposition of license restrictions. Similarly, warning letters may be sent or counseling interviews conducted as intermediate driver-improvement devices.

¹ See generally AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, GUIDE TO DRIVER IMPROVEMENT 33-46 (1965).

² Authority to order a "for cause" reexamination of licensees may be based on statutes or agency rules. *E.g.*, CAL. VEHICLE CODE §§ 13208, 13800, 13801 (West 1960); FLA. STAT. ANN. § 322.05 and Rule 295A-1.08 (1965); ILL. ANN. STAT. ch. 95½, § 6A-109, 6A-207 (Smith-Hurd 1958); IND. STAT. ANN. 47-2708(c)(f) (Burns 1966); MICH. STAT. ANN. § 9.2020(a) (1967); N.J. by agency rule; N.Y. VEH. & TRAF. § 501(8) (McKinney 1960); OHIO REV. CODE ANN. § 4505.20 (Page 1965); PA. STAT. ANN. tit. 75, § 608(g) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b, § 10 (1965).

³ See the discussion of medical advisory boards in ch. 8, *supra*. Florida, Indiana, New Jersey, and Pennsylvania have medical boards.

As with the original licensing process, all states in the study group have legislative predictor policies that require ministerial action by the licensing agency or by a court to withdraw the license.

In addition, all states in the study group have vested discretionary withdrawal authority in agencies and sometimes in courts. This phenomenon was discussed in connection with the licensing process and need not be repeated.⁴ As in the case of original license issue, the statutory language constitutes a mere guideline, and the agency (or court) must create the specific predictor policies to be applied in discretionary withdrawal actions.

Point systems and implied consent statutes probably account for most assertions of transferred power that result in withdrawal of the license. They are, therefore, not discussed in these introductory comments. However, other license withdrawal policies deserve some attention.

The predictor policies on which license withdrawals are based must be reasonably relevant to the goal of prevention of human failure leading to accident involvement. If they do not relate, they serve no public safety purpose and act merely to deprive the individual of his important interest in driving a motor vehicle. Hence, irrelevant predictor policies exact punishment for conduct deemed antisocial for reasons other than highway safety. For purposes of the following analysis, those predictor policies that attempt to identify drivers likely to fail are termed *predictive*. Those that do not predict driver failure are termed *punitive*. However, this is not to say that all punitive predictor policies are unconstitutional. As will be seen, some of them have been validated by the courts despite their lack of direct relevance to driver licensing goals. Others may be justifiable as safety-related enforcement devices.

Substantive predictor policies are emphasized because they have received little attention in prior legal studies. Much of the legal research in licensing administration appears to have assumed that development of adequate procedural protection is sufficient recognition of the individual's interest in retaining his driver's license. To repeat what was said of original licensing selection, no amount of equitable treatment, fair procedure, or court review will serve to make scientifically poor withdrawal predictor policies more effective in identifying the driver who is likely to fail. However, emphasizing procedural rights and court review of the procedures used does serve to make the administration of an invalid withdrawal prediction system more palatable to the public. It may go generally unnoticed that substantive injustice is being done in the name of highway safety if licensees receive procedurally fair treatment. For example, giving licensees an opportunity for an administrative hearing (procedural fairness) upon discretionary license withdrawal creates the illusion that one has received due process of law.

⁴ Ch. 3, *supra*.

However, unless the decision criteria that led to the license withdrawal are subjected to evaluation (substantive fairness), important relevant legal questions may go unanswered.

This analysis of license withdrawal standards is not meant to be exhaustive. For example, the withdrawal predictor policies discussed are illustrative only;⁵ withdrawal actions are not classified as cancellation, suspension, or revocation even though such distinctions are quite important for some purposes;⁶ and other withdrawal factors are omitted.⁷

⁵ For an analysis of additional grounds of withdrawal see A. ANTONY, *SUSPENSION AND REVOCATION OF DRIVERS' LICENSES* (1966).

⁶ *E.g.*, cancellation is usually without prejudice and another license may be sought immediately. Suspension constitutes a temporary withdrawal. Revocation constitutes a permanent withdrawal that requires re-application for an original license.

⁷ *E.g.*, the period of time for which the license is withdrawn under various types of license actions; whether the withdrawal action is based on a court conviction or receipt of information by the licensing agency that a violation has occurred where there has not yet been a conviction: IND. ANN. STAT. § 47-1081(8) (Burns 1966); UNIFORM VEHICLE CODE § 6-206 (1968); court seizure of the defendant's license after certain criminal convictions: CAL. VEHICLE CODE §§ 13205, 13550, 13552 (West 1960); FLA. STAT. ANN. § 322.25(1) (1965); ILL. ANN. STAT. ch. 95½ § 6A-204(1) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1052(b) (Burns 1966); MICH. STAT. ANN. § 9.2325 (1967); OHIO REV. CODE ANN. §§ 4507.16, 4507.161 (Page 1965) (probate court); TEX. REV. CIV. STAT. ANN. art. 6687b § 25(a) (1965); requirements that the license should be surrendered to the licensing agency upon withdrawal: CAL. VEHICLE CODE § 13551 (West 1960); FLA. STAT. ANN. § 322.29 (1965); N.J. STAT. ANN. § 39:5-35 (1961); ILL. ANN. STAT. ch. 95½ § 6A-209 (Smith-Hurd 1958); whether nonresidents are treated similarly to residents for license withdrawal purposes: CAL. VEHICLE CODE § 13552 (West 1960); FLA. STAT. ANN. § 322.23 (1965); MICH. STAT. ANN. § 9.2017 (1967); OHIO REV. CODE ANN. § 4509.33 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b § 29 (1965); elements of the Driver License Compact that are not treated in the text: CAL. VEHICLE CODE § 15000 (West 1960); FLA. STAT. ANN. § 322.43 (1965); ILL. ANN. STAT. ch. 95½ § 501 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2751 (Burns 1966); N.J. STAT. ANN. § 73 (1961); N.Y. VEH. & TRAF. § 516 (McKinney 1960); what the details are of the administrative hearing procedure offered by the agency; whether the agency or court has the authority to substitute probation or restriction for license withdrawal: CAL. VEHICLE CODE § 14250 (West 1960); whether the courts are authorized to make withdrawal recommendations to the licensing agency and if so whether they are binding: CAL. VEHICLE CODE § 13208 (West 1960) (investigation); CAL. VEHICLE CODE § 13210 (West 1960) (ordering the agency not to suspend); FLA. STAT. ANN. § 322.27(f) (1965) (recommendation); ILL. ANN. STAT. ch. 95½ § 63-205 (Smith-Hurd 1958) (restrictive permit instead of revocation in mandatory withdrawal cases); IND. ANN. STAT. § 47-1052 (Burns 1966) (binding on agency); PA. STAT. ANN. tit. 75, § 618(F) (Purdon 1960) (recommendation to the agency); requirements that courts forward reports of criminal convictions to the licensing agency and the effectiveness of the process of reporting: CAL. VEHICLE CODE § 1803 (West 1960); FLA. STAT. ANN. § 322.25(2) (1965); ILL. ANN. STAT. ch. 95½, § 6A-4021(1-3) (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-1052(a), 47-2311 (Burns 1966); N.J. STAT. ANN. § 39:59-42 (1961); N.Y. VEH. & TRAF. §§ 513, 514 (McKinney); OHIO REV. CODE ANN. § 4507.15 (Page 1965); PA. STAT. ANN. tit. 75, § 1209 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 25(b) (1965); requirement that courts forward to the licensing agency a record of judgments arising out of automobile accidents: ILL. ANN. STAT. ch. 95½, § 78-307 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1052(F) (Burns 1966); MICH. STAT. ANN. § 9.2211 (1967); OHIO REV. CODE ANN. § 4509.35 (Page 1965); PA. STAT. ANN. tit. 75, § 1412 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h

MANDATORY WITHDRAWAL POLICIES

Where predictor policies are contained in statutes, it is relatively unimportant which arm of government performs the task of withdrawal. Both licensing agencies and courts act ministerially and withdraw the license when the statutory condition is met. No power is transferred by the legislature. Because the predictor policy is statutory, it must be attacked constitutionally, if at all. Obviously, the primary constitutional issue is whether such legislatively created withdrawal predictor policies are rationally related to the goal of driver licensing. That is to say, the statutory predictor policies must not be merely relevant to highway safety in general, but they must relate to the prevention of human failure while driving. Obviously such a broad referent as "highway safety" would permit the approval of virtually all legislative predictor policies on some sort of rationale.⁸ Accordingly, court evaluations of licensing predictor policies that use "highway safety" as the referent are suspect for the reason that they prevent consideration of the constitutional issues that would arise if the referent were more precise.

Aside from the constitutional validity of statutory withdrawal predictor policies, the practical question arises as to whether they are applied or avoided. For example, most mandatory withdrawals are based on conviction of a criminal offense of some sort. Classification of the offense as criminal permits the defendant to request a jury trial in most instances, and jurors are commonly apprised of the fact that conviction of certain crimes will lead to automatic loss of the driver's license. The empathy of juries renders some mandatory predictor policies ineffective because of their refusal to convict. This is said to be a common occurrence in driving-while-intoxicated prosecutions⁹ and was a major reason for the

§ 12(a) (1965); whether appealing either the court conviction or the administrative action on which the license withdrawal is based has the effect of staying the withdrawal: FLA. STAT. ANN. § 322.272 (1965) (yes); ILL. ANN. STAT. ch. 95½, § 668-206(b) (Smith-Hurd 1958) (secretary may stay the order upon his own motion); MICH. STAT. ANN. § 9.2023(1) (1967) (court may grant stay); N.J. STAT. ANN. § 39:5-22 (1961) (appeal of the driving-while-intoxicated conviction does not stay the order); whether a license withdrawal is subject to executive clemency: TEX. REV. CIV. STAT. ANN. art. 6687b § 1(r) (1965).

⁸ The advantage of a precise referent in asserting lack of rational relationship is illustrated in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The case involved an attack on the validity of the Virginia poll tax as a prerequisite to voting. The majority insisted the proper public-purpose referent was intelligent use of the ballot or voting qualifications. Wealth or fee paying was determined to have no relation to this public purpose. Accordingly, the poll tax was declared unconstitutional as a denial of equal protection of the laws.

The dissent of Mr. Justice Black and to some extent that of Mr. Justice Harlan insisted the public-purpose referent was much broader than intelligent use of the ballot. Justice Black indicated, for example, that the state's desire to collect its revenue in this manner was a sufficient public-purpose referent to justify the poll tax.

⁹ I. Cisin, *Social Psychological Factors in Drinking-Driving*, in U.S. PUBLIC HEALTH SERVICE, ALCOHOL AND TRAFFIC SAFETY 3 (1963); see also H. Ross, D. Campbell, G. Glass,

adoption of implied consent statutes. Furthermore, mandatory withdrawal by licensing agencies upon conviction depends on court reports to the agency. If the reporting system is faulty, the agency may never receive notification of a criminal conviction requiring withdrawal. Of course, plea bargaining with the prosecutor may serve as an effective means of avoiding mandatory withdrawal of the license.

Although withdrawal predictor policies should correlate with human failure while driving, analysis of the legislation in the study group states discloses that some mandatory withdrawal policies are not relevant. Conversely, they appear to be punitive policies based on the "folklore" of highway safety and on legislative emotionalism. This is not to say, however, that such legislative action is necessarily unconstitutional. Some legislative policies that are punitive may be acceptable as aids to the effective implementation of the driver selection system. Others may not predict driver failure, may not arise until an accident has occurred, and may be designed to allocate accident costs. For example, the U.S. Supreme Court has upheld financial responsibility laws against constitutional attack.¹⁰ In the financial responsibility cases the Court determined that the social policy of ensuring collectibility of judgments arising out of automobile accidents justifies withdrawal of the driver's license upon default in payment. Apparently the adjudication of legal "fault" implicit in a civil judgment for damages was taken to indicate that human failure of the driver was also the scientific "cause" of the accident. Modern nonlegal research into the highway accident problem tends to view accidents as "caused" by multiple factors and rejects the tort action "fault" concept as overly simplistic. Discontent of legal scholars with the "fault" concept as a means of allocating accident costs¹¹ has coincided with the studies of safety researchers to raise questions as to the premises on which financial responsibility laws are based. Equating tort liability principles (policy) with empirical and statistical driver failure studies (scientific prediction) should be recognized as fallacious. Even so, financial responsibility statutes may be relevant to highway safety as a means of lessening the dramatic impact of a serious accident simply as a matter of policy without regard to scientific responsibility for the accident. Loss of the license may be viewed as a means of enforcing this policy. There is actually no attempt to predict driver failure, for such statutes do not come into play until an accident has already occurred.

PREDICTIVE MANDATORY WITHDRAWAL POLICIES

Examples of mandatory withdrawal policies that attempt to predict driver failure include conviction of a charge of negligent homicide or

UNIVERSITY OF COLORADO LABORATORY OF EDUCATIONAL RESEARCH, *THE BRITISH CRACKDOWN ON DRINKING AND DRIVING: A SUCCESSFUL LEGAL REFORM* 7 (1969).

¹⁰ *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962); *Reitz v. Mealey*, 314 U.S. 33 (1941).

¹¹ See, e.g., R. KEETON AND J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965).

manslaughter;¹² conviction of a charge of driving while intoxicated or while driving ability was "impaired" by consumption of alcohol;¹³ conviction of a charge of driving while under the influence of narcotics;¹⁴ conviction of a charge of driving while under the influence of amphetamines or other drugs;¹⁵ and conviction of three charges of reckless driving within a period of 1 year.¹⁶

These legislative policies are common to most of the study states and are arguably relevant to preventing human failure while driving. However, the Waller study¹⁷ mentioned earlier casts doubt on the validity of narcotics convictions as predictors of future accident involvement. California and the *Uniform Vehicle Code* require withdrawal of the license upon conviction of driving *if addicted* to drugs or *if a habitual user* of drugs.¹⁸ These illustrate the predictive policies that appear most frequently in the state statutes, although there are others.¹⁹

¹² CAL. VEHICLE CODE § 13350(a) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967); N.Y. VEH. & TRAF. § 510(2) (McKinney 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 24 (1965); UNIFORM VEHICLE CODE § 6-205 (1968).

¹³ CAL. VEHICLE CODE § 13350(a) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1052(a) (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967); N.J. STAT. ANN. § 39:4-50 (1961); N.Y. VEH. & TRAF. § 510(2) (McKinney 1960); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 24 (1965); UNIFORM VEHICLE CODE § 6-205 (1968).

¹⁴ CAL. VEHICLE CODE § 13350(a) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1052(a) (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967); N.J. STAT. ANN. § 39:4-50 (1961); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 24 (1965); UNIFORM VEHICLE CODE § 6-205 (1968).

¹⁵ CAL. VEHICLE CODE § 13350(a) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1052(a) (Burns 1966) (habit-forming); MICH. STAT. ANN. § 9.2019 (1967); N.J. STAT. ANN. § 39:4-50 (1961) (habit-forming); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); UNIFORM VEHICLE CODE § 6-205 (1968).

¹⁶ CAL. VEHICLE CODE § 13350(d) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967).

¹⁷ J. Waller, *Chronic Medical Conditions and Traffic Safety*, 273 NEW ENGLAND JOURNAL OF MEDICINE No. 26, at 1413-1420 (1965).

¹⁸ CAL. VEHICLE CODE § 13350(a) (West 1960); UNIFORM VEHICLE CODE § 6-205 (1968).

¹⁹ *E.g.*, finding or recommendation of juvenile court (offenses of manslaughter, habitual use of drugs, driving while intoxicated, 2 offenses of reckless driving within 1 year): CAL. VEHICLE CODE §§ 13355, 13356(a) (West 1960); adjudged afflicted with a mental disability or disease: ILL. ANN. STAT. ch. 95½, § 6A-205(b) (Smith-Hurd 1958); OHIO REV. CODE ANN. § 4507.161 (Page 1965); commercial driver convicted of not stopping at a railroad crossing: IND. ANN. STAT. § 47-2116 (Burns 1966); if the medical superintendent of a mental hospital reports the licensee as an unsafe driver: MICH. STAT. ANN. § 9.2003(1) (1967); bail forfeit on any motor vehicle offense charged until licensee submits to the jurisdiction of the court: N.Y. VEH. & TRAF. § 510(2) (McKinney 1960); if under 18, conviction of three violations of almost any type: OHIO REV. CODE ANN. § 4507.162 (Page 1965); conviction of engaging in a speed contest or drag racing: PA. STAT. ANN. tit. 75, § 618(a)(1) (Purdon 1960); court finding of epilepsy: TEX. REV. CIV. STAT. ANN. art. 6687b, § 30 (1965); driving while intoxicated on a beach: TEX. PENAL CODE art. 827F (1962).

By and large, the ministerial function of withdrawing the license upon a conviction is the responsibility of the licensing agency. However, in a few instances it is performed by the convicting court. For example, in Ohio almost all mandatory withdrawals are accomplished by the courts.²⁰

PUNITIVE MANDATORY WITHDRAWAL POLICIES

Substantive Policy

Policies Unconstitutional for Lack of Rational Relationship to Prevention of Driving Failure—Perhaps the outstanding example of a policy designed to punish antisocial behavior that has no relevance to preventing driving failure exists in New York. Its *Vehicle and Traffic Law* requires withdrawal of the license upon conviction in any state or federal court of the offense of advocating the violent overthrow of the government.²¹ Is it rational to presume that such persons will fail as drivers of motor vehicles and become involved in accidents? In a similar vein, Florida requires withdrawal of the license upon conviction of any violation of the laws against lewdness, assignation, and prostitution that involves the use of a motor vehicle.²² Does it follow that all violations of these laws that *incidentally* involve a motor vehicle *necessarily* involve poor driving behavior? Illinois requires withdrawal of the license upon conviction of rape, sexual crime against children, crime against nature, or soliciting in the streets, and its statute does not specify that a motor vehicle must be used in the commission of the offense.²³ Upon a second conviction the Illinois license is withdrawn for a period of 15 years.²⁴ As distasteful as these crimes may be, is not the criminal sanction imposed sufficient punishment? In the case of morals offenses, it is obvious that motor vehicles may be *incidentally* involved. But unless it is to be presumed that the prostitute plies her trade while driving, no relationship between the morals crime and potential accident-causing behavior will have been shown.²⁵

Most of the study group states and the *Uniform Vehicle Code* require withdrawal of the license upon conviction of any felony under the motor vehicle laws or any other felony in the commission of which a motor

²⁰ OHIO REV. CODE ANN. § 4507.16 (Page 1965).

²¹ N.Y. VEH. & TRAF. § 510 (McKinney 1960).

²² FLA. STAT. ANN. § 322.26 (1965).

²³ ILL. ANN. STAT. ch. 95½, § 6A-205(e) (Smith-Hurd 1958).

²⁴ *Id.*

²⁵ This is not to say states lack power to punish crime by withdrawing licenses in addition to, or instead of, fines and confinement. However, it must be remembered that these withdrawal provisions are not part of the criminal law of the states, and driver improvement programs are widely advertised as nonpunitive measures designed to improve driver performance and prevent highway accidents.

vehicle was used.²⁶ Perhaps some felony offenses are of such a nature as to inherently involve the risk of driving failure. But vehicle registration and titling felonies do not. Likewise, the phrase "any other felony" may be construed to require withdrawal of the license for such offenses as statutory rape at a drive-in theater, violations of the Mann Act,²⁷ illegal possession of narcotics, or "bootlegging." It is the breadth of the statement of the mandatory withdrawal policy that requires such irrelevant offenses to be used as the basis for license withdrawal.

Six of the study group states and the *Uniform Vehicle Code* require withdrawal of the license upon conviction of perjury, misstatement, or false statement under virtually any provision of the motor vehicle statutes.²⁸ The appropriate punishment for fraudulent transfer of title to a motor vehicle is the criminal sanction. Other illustrations might also be given.²⁹

Irrelevant Policies That Serve as Safety-Related Enforcement Devices—Examples of irrelevant punitive withdrawal policies include loss of the license for conviction of failure to stop at the scene of an accident and conviction of driving while the license is withdrawn.³⁰ It is acceptable social policy to require drivers to stop at the scene of accidents in which they are involved, for there may have been human failure. Rapid medical

²⁶ CAL. VEHICLE CODE § 13350(e) (West 1960); FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 24 (1965); UNIFORM VEHICLE CODE § 6-205 (1968). In Ohio the withdrawal is effected by the convicting court: OHIO REV. CODE ANN. § 4507.16 (Page 1965).

²⁷ 18 U.S.C.A. § 2421 (1951).

²⁸ FLA. STAT. ANN. § 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. § 9.2019 (1967); N.J. STAT. ANN. § 39:3-37 (1961); N.Y. VEH. & TRAF. § 510 (McKinney 1960); UNIFORM VEHICLE CODE § 6-205 (1968).

²⁹ If under age 18, the license is invalid during curfew hours: ILL. ANN. STAT. ch. 95½, § 6A-110 (Smith-Hurd 1958); conviction of auto theft: CAL. VEHICLE CODE § 13356(d) (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); UNIFORM VEHICLE CODE § 6-205 (1968) (unauthorized use of a motor vehicle); conviction of operating a motor vehicle with certain drugs (narcotics, tranquilizers, etc.) knowingly in possession or in the motor vehicle, unless prescribed by a physician or dentist: N.J. STAT. ANN. § 39:4-49.1 (1961); conviction of unlawful possession or sale of narcotics: PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960).

³⁰ Conviction of failure to stop at the scene of an accident: CAL. VEHICLE CODE § 13550 (c, d) (West 1960); FLA. STAT. ANN. §§ 317.071, 322.26 (1965); ILL. ANN. STAT. ch. 95½, § 6A-205(a) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1048 (Burns 1966); MICH. STAT. ANN. §§ 9.2019, 9.2317 (1967); N.Y. VEH. & TRAF. § 600 (McKinney 1960); PA. STAT. ANN. tit. 75, § 616(a) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701d § 38 (1965); UNIFORM VEHICLE CODE §§ 6-205, 10-102 (1968); conviction of driving while license is suspended or revoked: CAL. VEHICLE CODE § 13364 (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-303 (Smith-Hurd 1958) (includes mandatory jail sentence); IND. ANN. STAT. § 47-2907 (Burns 1966); MICH. STAT. ANN. § 9.2604 (1967); PA. STAT. ANN. tit. 75, § 616(b) (Purdon 1960); UNIFORM VEHICLE CODE § 6-303(b) (1968).

treatment for the injured is being given much attention as a means of minimizing injuries and loss of life. Likewise, extension of the period of withdrawal upon conviction of driving while the license is withdrawn is an arguably justifiable enforcement policy relevant to preventing human failure.

Policies Irrelevant to Predicting Driving Failure but Constitutional as a Means of Allocating Accident Costs—Mixed motives on the part of legislatures are reflected in the group of statutes providing for allocation of accident costs. It has been traditional to include in motor vehicle statutes provisions that attempt to ensure the collectibility of civil judgments that arise out of highway accidents.³¹ The study group states typically withdraw the license under the following circumstances: if uninsured, or not otherwise exempt; upon failure to deposit security with the licensing agency after an accident has occurred;³² failure to file an accident report;³³ failure to pay judgment arising out of an accident (immaterial if insured);³⁴ default in payment of any installment due on judgment arising out of an accident (immaterial when insured for liability);³⁵ and failure to file proof of financial responsibility for the future after conviction of an offense making withdrawal of the license mandatory.³⁶ In the last circumstance it is not necessary that there be an accident—just a conviction. As mentioned earlier, this is unwarranted, but is the result of imposing tort law “fault” concepts to highway accidents.³⁷ Allocating the costs of accidents through license sanctions may be acceptable though not at all predictive. The policy is safety-related in an after-the-fact sense but not in the scientific prediction sense.

³¹ E. FISHER, *VEHICLE TRAFFIC LAW* 33-34 (1961).

³² CAL. VEHICLE CODE §§ 16053, 16080 (West 1960); FLA. STAT. ANN. § 324.051(2); ILL. ANN. STAT. ch. 95½, § 7A-205(B) (Smith-Hurd 1958); IND. ANN. STAT. § 47-1047 (Burns 1966); MICH. STAT. ANN. § 9.2204 (1967); N.J. STAT. ANN. § 39:6-25 (1961); N.Y. VEH. & TRAF. § 335(a) (McKinney 1960); OHIO REV. CODE ANN. § 4509.17 (Page 1965); PA. STAT. ANN. tit. 75, § 1404 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h § 5 (1965); UNIFORM VEHICLE CODE § 7-206 (1968).

³³ ILL. ANN. STAT. ch. 95½, § 138(c) (Smith-Hurd 1958) (UNIFORM ACT REGULATING TRAFFIC ON HIGHWAYS); IND. ANN. STAT. § 47-1916 (Burns 1966); PA. STAT. ANN. tit. 75, § 1403 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h § 32(a) (1965).

³⁴ CAL. VEHICLE CODE § 16370 (West 1960); ILL. ANN. STAT. ch. 95½, § 7A-303 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1049 (Burns 1966); MICH. STAT. ANN. § 9.2212 (1967); N.J. STAT. ANN. § 39:6-35 (1961); N.Y. VEH. & TRAF. § 332 (McKinney 1960) (if the amount is in excess of \$150); OHIO REV. CODE ANN. § 4509.37 (Page 1965); PA. STAT. ANN. tit. 75, §§ 1407, 1413, (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h § 13(a) (1965); UNIFORM VEHICLE CODE § 7-310 (1968).

³⁵ CAL. VEHICLE CODE § 16487 (West 1960); FLA. STAT. ANN. § 324.151(3) (1965); ILL. ANN. STAT. ch. 95½, § 7A-313 (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-1047, 47-1051 (Burns 1966); MICH. STAT. ANN. § 9.2215 (1967); N.J. STAT. ANN. § 39:6-39 (1961); N.Y. VEH. & TRAF. § 334 (McKinney 1960); OHIO REV. CODE ANN. § 4509.42 (Page 1965); PA. STAT. ANN. tit. 75, § 1416 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h § 16(c) (1965); UNIFORM VEHICLE CODE § 7-209(c) (1968).

³⁶ FLA. STAT. ANN. § 324.072 (1965); N.Y. VEH. & TRAF. § 331 (McKinney 1960); OHIO REV. CODE ANN. § 4509.31 (Page 1965); UNIFORM VEHICLE CODE § 7-304 (1968).

³⁷ *Supra* notes 10 and 11 and accompanying text.

Procedural Policy

With the exception of financial responsibility statutes the large majority of mandatory withdrawals follow court convictions of specified offenses. Hence, there is usually no due process requirement for a further hearing. The fact-finding and adjudicating processes of the criminal courts are sufficient justification for immediate imposition of the licensing sanction.

In the few instances where mandatory withdrawal is not based on a court conviction, the licensee may be afforded an administrative hearing opportunity. However, it is probably permissible to take action immediately and delay the hearing until later.³⁸ An administrative hearing would permit consideration of the issue of the constitutionality of application of the statutory withdrawal standard to the facts of the particular case. However, the agency would probably lack authority to declare unconstitutional the statutory policies that it implements ministerially.³⁹

Based on an apparent assumption that all its mandatory withdrawal provisions are constitutional, the *Uniform Vehicle Code* impliedly cuts off court review of such license withdrawal actions.⁴⁰ If legally effective, this provision means that all constitutional issues relevant to the substantive policy that requires withdrawal must be raised during the criminal trial. It also raises the fundamental question whether the legislative branch may prevent judicial review of the constitutionality of its statutory policy.⁴¹

DISCRETIONARY WITHDRAWAL POLICIES

Where power is transferred to a licensing agency or a court to withdraw licenses, articulation of the criteria of decision is imperative.⁴² The statutory language is general and defines only the boundaries within which the transferred power must be exercised. The specific criteria of decision are created by the agencies and courts. Of course, even the power boundaries defined may be unconstitutional—not because of the

³⁸ *E.g.*, *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). Where the Food and Drug Administration seized drugs alleged to be misbranded without a prior hearing, the Court said:

We have repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective.

Accord, *Wall v. King*, 206 F2d 878 (1st Cir. 1953), *cert. den.* 346 U.S. 915 which involved summary withdrawal of a driver's license. 2 F. COOPER, *STATE ADMINISTRATIVE LAW* 498 (1965).

³⁹ 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.04 (1958); *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958).

⁴⁰ *UNIFORM VEHICLE CODE* § 6-222 (1968).

⁴¹ *See, e.g.*, 4 K. DAVIS, *supra* note 39, at § 28.18-28.19, and cases therein cited.

⁴² *See* the discussion on this point in 2 F. COOPER, *supra* note 38 at 487-90.

fact of power transfer, but because they are not relevant to preventing driver failure. If the underlying power transfer language is unconstitutional, specific criteria of decision based on that power are similarly invalid. Examples of constitutionally suspect power transfer language appear in connection with discretionary withdrawal policies deemed to be punitive.

If the statutory power transfer is assumed to be constitutional, a statement of the criteria of decision is said to be imperative, for unless decision criteria are known the basis of the licensing decision cannot be evaluated. Without evaluation of the decision, the use of transferred power cannot be confined to the creation of policies relevant to the goal of driver licensing. If policy is not known and is not relevant to the goal it addresses, licensees suffer without justification because of surreptitious, irrelevant grounds of decision. This constitutes an abuse of POWER at the expense of PEOPLE.

Whereas power shared by agencies and courts was deemed somewhat irrelevant to the administration of mandatory withdrawal policies, the sharing of discretionary withdrawal power presents an opportunity for the imposition of widely varying criteria of decision. That is, there may be a variance between the policies of the agency and the courts and also a variance between courts. The dangers of lack of uniformity in license withdrawal policy may justify minimizing or eliminating shared withdrawal power. Arguments may be made that courts should have little or no authority in discretionary withdrawal areas. A central licensing agency has the capability of developing uniform withdrawal criteria that may be applied statewide. The licensing agency may also readily adapt its decision criteria to research developments that occur. Through the use of their rule-making authority, driver licensing agencies may translate research results into licensing predictor policies quite efficiently. Furthermore, licensing agencies are more closely associated with the National Highway Traffic Safety Administration and groups conducting empirical and other highway safety research. It may be assumed the agency is more likely to be informed of such research developments, and it should be more receptive to change than the individual judges of the state courts. Despite statements to the contrary, it has not been established that merely because of experience judges are capable of performing the predictive function involved in discretionary withdrawal of the license.

A practical advantage of discretionary withdrawal power implemented by agencies and courts is the opportunity to avoid absurd mandatory withdrawal policies. As has been seen, legislatures may enact statutory provisions that are of questionable utility and constitutionality. Nonetheless, because they are legislative commands, the agency or court must give them effect by withdrawing the license. The only formal means of escape from such undesirable policies is essentially the jury system, which

may deny the prerequisite conviction on which withdrawal would be based. Similarly, the knowledge of jury reluctance may lead to fewer prosecutions of unpopular mandatory withdrawal offenses. On the other hand, transferred power gives the agency or court an opportunity to either (a) adopt relevant criteria within the guidelines established or (b) ignore permissive grounds of withdrawal that are considered to be absurdly irrelevant to the goals of driver licensing. What must be done covertly and indirectly to avoid mandatory withdrawals based on punitive policies may be done overtly and directly where withdrawal is discretionary. Thus, discretionary withdrawal authority in agencies or courts may actually serve as a check on irresponsible legislative policy making. Of course, discretionary power may also be abused by the power holder.

PREDICTIVE DISCRETIONARY WITHDRAWAL POLICIES

Contrary to mandatory withdrawal policies, it is common to permit discretionary withdrawal of the license without the necessity of obtaining a court conviction of some traffic law violation.⁴³ Most states in the study group permit agencies to initiate investigations and act on information contained in medical reports from physicians, accident reports, or complaints from public officials, friends, and relatives. Naturally, without the check of a prior criminal trial, due process considerations are paramount. Articulation of specific decision criteria and adjudicatory hearings are the principal intra-agency means of affording due process of law to licensees.

Examples of predictive withdrawal policies drawn from an analysis of the statutes of the study group states include the following: without conviction—being involved as a driver in a serious or fatal accident;⁴⁴ without conviction—being involved in repeated accidents;⁴⁵ without conviction—evidence that the licensee is a reckless, negligent, or incompetent driver;⁴⁶ discovery that the licensee was not actually eligible

⁴³ This may be accomplished by means of a statute that permits summary withdrawal of the license on the basis of evidence believed by the licensing agency to be sufficient to indicate the licensee has committed an "offense" for which he may be later "convicted." See, e.g., UNIFORM VEHICLE CODE § 6-206 (1968).

⁴⁴ CAL. VEHICLE CODE § 13800 (West 1960) (after investigation); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b) (deemed "responsible for" the accident). Accident "causes" are not justifiably established by routine accident investigations. See M. Blumenthal, H. Wuerdemann in 1 TRAVELERS RESEARCH CENTER, INC., A STATE ACCIDENT INVESTIGATION PROGRAM 21 (1968).

⁴⁵ CAL. VEHICLE CODE § 13800 (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958).

⁴⁶ CAL. VEHICLE CODE § 13800 (West 1960); FLA. STAT. ANN. § 322.27 (1965); IND. ANN. STAT. § 47-1081(a) (Burns 1966); N.Y. VEH. & TRAF. § 510(3) (McKinney 1960); PA. STAT. ANN. tit. 75, § 618(a)(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b) (1965); UNIFORM VEHICLE CODE § 6-206(a) (1968).

to be licensed;⁴⁷ without conviction—evidence that the licensee has committed an offense for which license withdrawal is mandatory on conviction;⁴⁸ commission of an out-of-state offense that would be grounds for license withdrawal in the state of licensing;⁴⁹ conviction of a single or repeated traffic law violations;⁵⁰ and willful commission of the offense of passing a stopped school bus.⁵¹

Withdrawal power is vested in agencies in the large majority of the study states. The courts share little of the withdrawal power.⁵²

PUNITIVE DISCRETIONARY WITHDRAWAL POLICIES

Discretionary withdrawal policies that are punitive in nature do not require a court conviction as a prerequisite to withdrawal action. Examples of punitive discretionary withdrawal policies include failure to file an accident report;⁵³ willful failure to appear in court on a traffic law violation;⁵⁴ permitting unlawful or fraudulent use or display of a license;⁵⁵ refusal to submit to a reexamination of licensing qualifications;⁵⁶ driving while the license is withdrawn (an additional period of

⁴⁷ CAL. VEHICLE CODE §§ 13359, 13800 (West 1960); ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); UNIFORM VEHICLE CODE § 6-201 (1968).

⁴⁸ ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1081(a) (Burns 1966); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b) (1965); UNIFORM VEHICLE CODE § 206(a) (1968).

⁴⁹ CAL. VEHICLE CODE § 13363 (West 1960); FLA. STAT. ANN. § 322.27 (1965); ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); IND. ANN. STAT. § 47-1081(b) (Burns 1966) (financial responsibility withdrawal); MICH. STAT. ANN. § 9.2018 (1967); N.J. STAT. ANN. § 39:5-30.1 (1961); PA. STAT. ANN. tit. 75, § 618(c) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b) (1965); UNIFORM VEHICLE CODE § 6-203, 6-206(a) (1968).

⁵⁰ FLA. STAT. ANN. § 322.27 (1965) (upon court recommendation); IND. ANN. STAT. § 47-1081(a) (Burns 1966); N.J. STAT. ANN. § 39:5-30 (1961) (any violation); N.Y. VEH. & TRAF. § 510(3) (McKinney 1960); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960).

⁵¹ N.J. STAT. ANN. § 39:4-128.1 (1961).

⁵² Exceptions include CAL. VEHICLE CODE § 13200 (West 1960), which vests courts with discretionary authority to withdraw licenses after a speeding or reckless driving conviction, unless withdrawal is mandatory upon conviction; IND. ANN. STAT. § 47-1052 (Burns 1966) gives courts discretion to recommend withdrawal after any motor vehicle conviction and the recommendation is binding on the agency; OHIO REV. CODE ANN. § 4507.34 (Page 1965), courts have discretion to withdraw license; TEX. PENAL CODE art. 814 (1962) authorizes a conviction court to withdraw the license for 30 days in addition to other penalties.

⁵³ CAL. VEHICLE CODE § 16004 (West 1960) (willful); MICH. STAT. ANN. § 9.2203 (1967); N.J. STAT. ANN. § 39:4-130 (1961); OHIO REV. CODE ANN. § 4509.09 (Page 1965); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b), 6701d § 43, 44 (1965).

⁵⁴ CAL. VEHICLE CODE § 13365 (West 1960); PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960).

⁵⁵ CAL. VEHICLE CODE § 13800 (West 1960); FLA. STAT. ANN. § 322.27 (1965); ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); MICH. STAT. ANN. § 9.2024 (1967); TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b) (1965); UNIFORM VEHICLE CODE § 6-206(a) (1968).

⁵⁶ CAL. VEHICLE CODE § 13801 (West 1960); FLA. STAT. ANN. § 322.221 (1965); ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2708 (Burns 1966);

withdrawal is imposed);⁵⁷ violation of license restrictions;⁵⁸ and conviction of an offense involving the use or possession of narcotics (whether or not a motor vehicle is involved).⁵⁹ There are others that might also be mentioned.⁶⁰

As with the predictive policies, there is little or no sharing of discretionary power by agencies and courts where withdrawal policies are punitive in nature. Two exceptions include the authority of California trial courts to withdraw the license upon conviction of any offense involving use or possession of narcotics⁶¹ and the power of a trial court to recommend withdrawal upon conviction of taking a vehicle.⁶² Florida authorizes courts to withdraw the license upon conviction of fleeing or attempting to elude a police officer.⁶³ Texas courts are authorized to withdraw the license for up to 30 days in addition to other penalties imposed for violation of *any* penal provision relating to highways.⁶⁴ The penal violations include, for example, the offense of fishing off a bridge.

PROCEDURAL POLICIES APPLICABLE TO DISCRETIONARY WITHDRAWAL

Unless driving is to be characterized as a "mere privilege," due process of law procedural standards must be met to justify discretionary withdrawal of the license. If a court imposes withdrawal, that action will probably follow a court proceeding that affords procedural due process. Hence, due process concerns focus on the hearing opportunity afforded by licensing agencies.

Even if driving is conceived to be a manifestation of constitutionally

N.Y. VEH. & TRAF. § 501(8) (McKinney 1960); OHIO REV. CODE ANN. § 4507.20 (Page 1965).

⁵⁷ CAL. VEHICLE CODE § 13364(b) (West 1960) (upon conviction); ILL. ANN. STAT. ch. 95½, § 6A-206, 306 (Smith-Hurd 1958); UNIFORM VEHICLE CODE § 6-303(b) (1968) (upon conviction).

⁵⁸ CAL. VEHICLE CODE § 16457 (West 1960) (insurance restrictions); ILL. ANN. STAT. ch. 95½, § 6A-113 (Smith-Hurd 1958); MICH. STAT. ANN. § 9.2012 (1967); OHIO REV. CODE ANN. § 4507.14 (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6687b-12 (1965).

⁵⁹ CAL. VEHICLE CODE § 13800 (West 1960).

⁶⁰ Operations in violation of curfew: ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); PA. STAT. ANN. tit. 75, § 604.1 (Purdon 1960) (junior operator—under 18—who operates between 12 midnight and 5 a.m.); violation conviction of trespass to vehicles: ILL. ANN. STAT. ch. 95½, § 6A-206 (Smith-Hurd 1958); conviction of a knowing violation of weight limits of motor vehicles: IND. ANN. STAT. § 47-548 (Burns 1966); failure to give change of address: MICH. STAT. ANN. § 9.201 (1967); conviction of a felony: N.Y. VEH. & TRAF. § 510(3) (McKinney 1960); any criminal conviction of a licensee under age 18: N.Y. VEH. & TRAF. § 510(2) (McKinney 1960); giving a bad check to pay license fees: PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960); conviction of abandoning a vehicle on highway or elsewhere: PA. STAT. ANN. tit. 75, § 618(b) (Purdon 1960).

⁶¹ CAL. VEHICLE CODE § 13202 (West 1960).

⁶² CAL. VEHICLE CODE § 13357 (West 1960).

⁶³ FLA. STAT. ANN. § 317.0109 (1965).

⁶⁴ TEX. PENAL CODE art. 814 (1962).

protected right to travel, due process of law is probably afforded the licensee whose license is temporarily suspended with a later opportunity for hearing. Where public health and welfare are involved, the Supreme Court has indicated that immediate action may be taken with a hearing opportunity to follow.

Specific administrative hearing rights may arise from (a) driver licensing statutes, (b) state administrative procedure legislation or case law, and (c) constitutional due process requirements. Assuming that some form of hearing opportunity exists, the primary due process and equal protection questions are substantive rather than procedural. To repeat what has been said, procedural fairness is not the sole due process consideration by which administrative action is judged. Where a valuable personal interest is involved, the Supreme Court has indicated that the substantive criteria on which the decision is based are to be evaluated.⁶⁵ If the criteria by which an agency exercises its withdrawal power are not articulated, a major purpose of the administrative hearing is frustrated and becomes illusory. For example, if the administrative hearing is conducted as a "show cause" proceeding, the burden of proof is on the licensee to establish that withdrawal is not justified. However, if the substantive criteria of decision are unknown, the licensee is unable to prepare his case because he does not know what factors are critical to the withdrawal decision. In effect, the hearing officer may effectively foreclose the substantive aspect of the hearing with a simple "Do you have anything to say in your behalf?" If substantive decision criteria are unknown, how is the licensee expected to make an intelligent response?

THE DRIVER LICENSE COMPACT

Six of the states in the study group are parties to the interstate Driver License Compact⁶⁶ established on the basis of the Beamer Resolution of 1958.⁶⁷ The Compact is based on the presumption that highway safety is materially affected by the degree of compliance with state laws and local ordinances regarding vehicle operation. Keeping a driver's license is predicated on such compliance wherever a vehicle is operated. If a non-resident is convicted of a traffic violation in a party state, it agrees to report the conviction to the state of licensing. The licensing authority in a party state agrees to give the same effect to specified out-of-state con-

⁶⁵ *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶⁶ THE COUNCIL OF STATE GOVERNMENTS, THE DRIVER'S LICENSE COMPACT AND THE VEHICLE EQUIPMENT SAFETY COMPACT (1962); CAL. VEHICLE CODE § 15000 (West 1960); FLA. STAT. ANN. § 322.43 (1965); ILL. ANN. STAT. ch. 95½, § 501 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2751 (Burns 1966); N.J. STAT. ANN. § 39:5d (1961); N.Y. VEH. & TRAF. § 516 (McKinney 1960).

⁶⁷ P.L. 85-684; 72 Stat. 635 (1958).

victions as it would if the conduct had occurred in the licensing state. The offenses specified include manslaughter or negligent homicide, driving while intoxicated or under the influence of drugs, conviction of any felony in the commission of which a motor vehicle was used, and conviction of failure to stop at the scene of an accident.

The effect of this Compact provision is to permit the party states to effect license withdrawals upon criminal convictions occurring elsewhere. Some state statutes contain provisions authorizing licensing agencies to withdraw licenses on the basis of foreign state convictions if such a conviction constitutes grounds for withdrawal when committed within the state of licensing.⁶⁸ The Compact provision serves to formalize this arrangement. Nonetheless, creative administration of licensing statutes may permit the same opportunity in states not party to the Compact. Administrators possessing similar discretionary withdrawal authority are not required to await legislative approval of the Compact but may establish withdrawal policies through the rule-making process.

To prevent licensees from attempting to obtain a license in one state while under suspension in another state, the Compact parties agree to deny licenses to all persons whose licenses are withdrawn in a party state at the time of application. New York is a party to the Compact and has extended the list of out-of-state convictions to include advocating the violent overthrow of the government and knowingly permitting a motor vehicle to be used in the furtherance of a crime.⁶⁹ The effect is to make these irrelevant offenses applicable to New York drivers in other party states.

BASING LICENSE WITHDRAWAL ON TRAFFIC VIOLATIONS: A QUESTIONABLE PREMISE

As has been observed, many withdrawal actions are based on convictions or "offenses" against traffic laws. An assumption has been made that particular offenses involve such deviant driver behavior that they are excellent predictors of future accident involvement. Hence, upon a single conviction the license is withdrawn automatically. Other offenses are not believed to be so serious, but a pattern of repeated violations is assumed to be a valid predictor of future accident involvement. However, these assumptions have not been substantiated by high-quality research and are, therefore, subject to question. Dr. Leon Goldstein has demonstrated the instability of accident rate and the poor correlation between traffic violations and future accident involvement.⁷⁰

Professor Roger Cramton has also pointed out the lack of predictive

⁶⁸ *Supra* note 49.

⁶⁹ N.Y. VEH. & TRAF. § 516, art. IX (McKinney 1960).

⁷⁰ L. GOLDSTEIN, *Driver Selection—The Lure, Logic and Logistics*, TRANSACTIONS, NATIONAL SAFETY CONGRESS (1963).

relevance of violations to accident involvement.⁷¹ If it is established that traffic violations have little or no predictive validity as a basis for identifying "problem drivers," a basic flaw in American license withdrawal systems will have been revealed. If there is no valid prediction, is there justification for withdrawal?

Point systems are primary offenders if this is true, for they assume traffic violations to be valid predictors of driver failure. Because they probably account for most license withdrawal actions, point systems are to be given detailed attention.

⁷¹ R. Cramton in Insurance Institute for Highway Safety, *DRIVER BEHAVIOR—CAUSE AND EFFECT* 195-196 (1968). See also R. COPPIN, *THE 1964 CALIFORNIA DRIVER RECORD STUDY*, Part IV (1965) (the relationship between concurrent accidents and citations); *id.* Part VI (1965) (the stability of reported accidents and citations); *id.* Part VII (1966) (the relationship between types of convictions and accidents).

11 WITHDRAWAL OF LICENSES: POINT SYSTEMS

In addition to the bases for license withdrawal discussed in the previous chapters, most of the states in the study group have adopted point systems as a method of selecting licensees for driver improvement action.

What is a point system? Basically, it is a refined method of attempting to predict driver failure leading to accident involvement on the basis of a driver's history of traffic law violations. A point system presumes that traffic law violations are indicators of future driver failure (although this premise has not been reliably validated), and if the frequency and seriousness of violations reaches a certain level some type of action will occur.

Specific traffic violations are ranked according to an estimate of the extent of their relevance to accident involvement behavior. The offenses believed to be more reliable predictors of driver failure are awarded a higher point value than those thought to be less reliable. However, if such a weighted point score method is to predict more accurately than weighing all traffic violations equally, the ranking of violations as to their predictive validity must be established empirically or by sound statistical methods.¹ That is to say, the traffic offenses utilized in the point system schedule must be reliably known to relate to driver failure. In addition, the predictive validity of each offense relative to other offenses must be reliably established so that varying point weights may be sensibly assessed according to that relationship.

¹ This fact was established by a study of the California point system. See R. Coppin, R. McBride and R. Peck, Part 8, *The Prediction of Accident Involvement Using Concurrent Driver Record Data*, and Part 9, *The Prediction of Accident Involvement From Driver Record and Biographical Data*, STATE OF CALIFORNIA, DEPARTMENT OF MOTOR VEHICLES, THE 1964 CALIFORNIA DRIVER RECORD STUDY, Part 8, at 12, Part 9, at 1 (1967).

Attempts to demonstrate a predictive relationship between traffic law violations and future driver failure were conducted by the Institute of Government of the University of North Carolina in 1958 and by the California Department of Motor Vehicles in 1967.² In the North Carolina study the records of more than 45,000 North Carolina drivers were selected at random from the files of the Department of Motor Vehicles. These records were subjected to a regression analysis to determine which violations were significantly correlated with accidents and to establish the extent of that correlation. From an initial 20 variables subjected to machine analysis, six specific traffic law violations were determined to have greater predictive value than others and were included in a recommended schedule of points.³

The North Carolina study is significant in that the point values assigned and the offenses chosen as predictors were not determined on the basis of a priori opinions as to the "seriousness" of certain offenses. The complex statistical methods used were designed to eliminate subjective opinion and select and weigh the offenses according to mathematical objectivity. For example, it is common to assume that speeding is a good predictor of future accident involvement if a pattern of speeding violations appears in the record of the driver. However, the North Carolina study indicated that of the six specified offenses chosen as predictors, speeding was the least valid of the group.⁴ The California study corroborates this finding.⁵ Hence, it is imperative that careful research serve as the basis for selecting the offenses and establishing the weighting scores.⁶

The *relative* weighting of the offenses is crucial, for it represents mathematically the predictive validity assigned each offense, and it serves to require more occurrences of the less predictive offenses in order to justify driver improvement action.⁷ If offenses are chosen and weighted on the basis of "folklore," unreliable research, or poor statistical methods, there is no reason to assume that such a point scheme is any more reliable than other methods of identifying licensees for driver improvement action. The California study confirms this hypothesis. California's point system is statutory and the point weights for various offenses were assigned

² *Id.*; B. Campbell, in UNIVERSITY OF NORTH CAROLINA INSTITUTE OF GOVERNMENT AND AAMVA, DRIVER IMPROVEMENT—THE POINT SYSTEM 237-245 (1958).

³ The six chosen were passing on a curve or hill; following too closely; driving on wrong side of road; failing to signal; reckless driving; and speeding. See DRIVER IMPROVEMENT, *supra* note 2, at 239.

⁴ *Id.*

⁵ RECORD STUDY, *supra* note 1, Part 9, at 13.

⁶ *I.e.*, current accident records systems are biased against drivers. B. Campbell in ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM 14 (1967). Yet the National Safety Council bases safety recommendations on these data and often emphasizes the "nut behind the wheel" as the primary cause of accidents.

⁷ DRIVER IMPROVEMENT, *supra* note 2, at 239-241.

according to the a priori assumptions of the legislative body. A regression analysis of driver records indicated the lower point value offenses actually contributed more to accident prediction than the higher point value offenses.⁸ Furthermore, the data suggested that the total number of convictions, regardless of type or point value, would be as efficient in predicting accidents as assigning different weights to various types of violations.⁹

Parenthetically, it should be mentioned that a point system based on subjective ideas of the "seriousness" of various traffic offenses may be poor science, poor law, and yet be legally acceptable. So long as courts perceive a rational relationship between the legal policy (a point system) and attempts to prevent driver failure, it will not be struck down merely because it cannot be scientifically validated. Legally speaking, a common-sense assumption of rational relationship may be sufficient unless that assumption is demonstrated to be fallacious. Therefore, as the empirical knowledge base enlarges, it may eventually demonstrate the falsity of the earlier common-sense assumption. The legal argument would then be raised that the point system does not predict human failure resulting in accidents, is not related to the policy goal, and therefore serves merely to infringe the individual need to drive. Hence, legal policy, although valid when made, may later become invalid because of greater knowledge.

Returning to a discussion of the point system itself, another element of its structure is a predetermined point total or "action level" policy that serves to trigger driver improvement action with respect to the individual whose conviction point total reaches that level. By means of the weighted point scale (predictors) and the predetermined action level (policy), the science-law-policy decision mix is formalized to select out for treatment the drivers who are believed to be unacceptable or borderline risks. Upon selection of licensees for treatment, the point system has served its purpose. It may select, but it is of no utility to the court or the licensing authority, which must determine what sort of driver improvement action is appropriate in an individual case.

Despite attempts to base point weighting on complex mathematical analyses, a major criticism of point systems arises out of the fact that sophisticated research has not established scientifically reliable correlations of high validity between any particular traffic law violation and future accident involvement. Basic research has thus far established only gross relationships between traffic law violations and accident behavior.¹⁰ Accordingly, a point system based on low-validity accident predictors (traffic offenses) will identify as future accident-involved drivers many

⁸ RECORD STUDY *supra* note 1, Part 8, at 12.

⁹ *Id.*, Part 9, at 1.

¹⁰ *Id.* Generally, RECORD STUDY *supra* note 1, Part 8, at 13; DRIVER IMPROVEMENT, *supra* note 2, at 239; R. Cramton, in INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT 196 (1968).

licensees who will not actually become involved in accidents. Thus the scientific fact is that point systems, because of the poor correlation between traffic violations and future accidents, do not predict well at all.¹¹ The North Carolina and California studies imply as much. However, point systems do perform an equal-protection function by routinizing the method of identification of potential problem drivers. Application of a point system works equal justice or injustice on all licensees.

Hence, point systems could perhaps serve better at present as a diagnostic technique for identifying licensees who should be given counseling or some other type of driver improvement action short of suspension or revocation of the license.¹² The low scientific validity of point system selections indicates that license withdrawal on the basis of points has little rational justification.

However, it has been suggested that if a standard point system scale were applied nationwide, the small increment of improvement in predictive validity offered by the scientifically structured point system could be justified as an epidemiological approach to highway safety.¹³ That small increment of predictive improvement, when applied to a base of 100 million licensees instead of the 45,000 in North Carolina, arguably could save a sufficient number of lives and prevent a sufficient number of accidents and injuries to justify the costs involved. It would appear to be feasible to establish a nationwide uniform point scale because the simple expedient of varying the action level that triggers driver improvement action would permit each state to adjust its implementation of the point scale according to the availability of personnel and resources. Perhaps the NHTSA could establish such a nationwide point scale as a uniform standard and allow adjustment of the action level within a predetermined national range in order to maintain some control on driver improvement throughout the nation.

Another complication involved in creating a scientifically oriented point system is enforcement policy. Enforcement policy and selective enforcement determine the charges that are filed and out of which reported convictions result. If enforcement policy changes, the conviction report mix may change and lessen or destroy the validity of the point scale predictions. Thus, there should not be any change in enforcement policy merely because statistical analysis of accident records has established a group of traffic offenses as point system predictors. The validity of the predictors is based on the enforcement policy in effect during the time period reflected in the data accumulated.¹⁴

A final characteristic of point systems that was mentioned briefly earlier is that the action level may be manipulated for caseload handling without destroying the predictive validity of the weighted system. How-

¹¹ *Id.*

¹² R. Cramton, *supra* note 10, at 192. *Cf. id.* panel report at 254-55.

¹³ DRIVER IMPROVEMENT, *supra* note 2, at 239.

¹⁴ *Id.* at 243.

ever, the *relative* weighting of offenses to each other, if empirically or statistically established, must not be changed without further analysis justifying it. If it is believed that point score values should be modified, a change in one or more point scores must be accompanied by proportionate changes in other point scores if the prior level of predictive validity is to be maintained. This should serve as a warning to the administrator who fails to recognize the significance of the *relative* weighting of offenses in the point scheme.

SIGNIFICANT CHARACTERISTICS OF POINT SYSTEMS IN THE STUDY GROUP STATES

Point systems constitute part of the driver programs in eight of the study group states. A modified type of point system is in use in Illinois, but it is not included because licensees are selected for driver improvement action on the basis of total number of traffic violations and not by relative weights assigned to violations. Illinois uses the point system as a guide to determine the appropriate administrative action that follows selection. Similarly, in Texas licensees are selected on the basis of total number of violations.¹⁵ Unlike Illinois, however, Texas does not use a point scheme to determine the administrative action that follows.

Legislative or Administrative Basis

In five of the states the point system was established by legislatures, which chose the offenses to be included as predictors, established the point values, and determined the action level.¹⁶ In three states the point system components were established by the licensing agency.¹⁷ In only one of the three states was the administratively created point system filed as a formal rule or regulation of the agency.¹⁸

Unfortunately, what is still unknown is the basis on which the offenses were chosen and weighted. The North Carolina and California studies are the only known efforts to choose offenses and establish relative point values on the basis of rigorous statistical analysis of driver records and

¹⁵ TEX. REV. CIV. STAT. ANN. art. 6687b, § 22(b)(4) (1965).

¹⁶ CAL. VEHICLE CODE § 12810 (West 1960); FLA. STAT. ANN. § 322.27(2) (1965); MICH. STAT. ANN. § 9.2020(1) (1967); OHIO REV. CODE ANN. § 4507-40(G) (Page 1965); PA. STAT. ANN. tit. 75, § 619.1 (Purdon 1960).

¹⁷ Indiana, New Jersey, New York. Administrative point systems have generally been upheld by the courts. *E.g.*, *State v. Birmingham*, 95 Ariz. 310, 390 P.2d 103 (1964); *Sturgill v. Beard*, 303 S.W.2d 908 (Ky. 1957); *Anderson v. Comm'r of Highways*, 267 Minn. 308, 126 N.W.2d 778 (1964); *Ross v. MacDuff*, 309 N.Y. 56, 127 N.E.2d 806. However, in North and South Carolina, administrative point systems were struck down by the courts on non-delegation grounds: *Horvell v. Scheidt*, 249 N.C. 699, 107 S.E.2d 549 (1959); *So. Carolina State Highway Dep't v. Harkin*, 226 S.C. 585, 86 S.E.2d 466 (1955).

¹⁸ New Jersey Departmental Regulation 13:4-124.2, July 12, 1966.

accident reports. In all eight study group states the offenses and point values were apparently chosen on the basis of subjective judgment by the legislature or the licensing agency. If this be true, the point values lack statistical validity and, other than "common sense," there is no particular reason to presume the offenses bear any predictive relationship to future driving failure. In scientific terms, therefore, the study state point systems may be expected to predict little or not at all.¹⁹ It must be remembered that the North Carolina and California studies demonstrated that rigorous mathematical analysis revealed only low value correlations between traffic offenses and accident involvement.

Nonetheless, in terms of sociolegal policy, the state legislatures and administrative officials are to be commended for establishing point systems. First, the existence of the system constitutes a declaration of policy on the part of the agency as to how it will evaluate particular offenses that are believed to relate to accident-causing behavior. By so doing, the legislators and administrators give content to such vague phrases as "habitual violator,"²⁰ "negligent operator,"²¹ and similar phrases contained in many state statutes. Second, in addition to providing a declaration of policy, point systems encourage equal protection of licensees. Formally, at least, the point system is applied in similar fashion to all licensees and provides either justice or injustice in an even-handed fashion. Nevertheless, it may be argued that point systems deny equal protection where their components are purely arbitrary classifications not relevant to accident prediction.

Points Based on Court Convictions

Another characteristic of point systems is that points are assessed only for court convictions, pleas of guilty, or bond forfeitures relating to the traffic offenses charged, and the offenses assessed point values are limited to moving violations. California permits the Department of Motor Vehicles to evaluate automobile accidents and assess a point to the record of any operator who is "deemed by the Department to be responsible" for the accident.²² Manifestly, the evaluation of "blame" for an accident is highly subjective and difficult to apply consistently to all accident situations.

Points Assessed for Irrelevant Offenses

Since the purpose of the point system is to predict improper driving behavior, it is arguably unreasonable to include in the point system

¹⁹ However, the California study concluded that the multiple-violations approach taken by Illinois and Texas would probably be as efficient in predicting accidents as assigning weights to various types of violations. RECORD STUDY *supra* note 1, Part 9, at 1.

²⁰ TEX. REV. CIV. STAT. ANN. art. 6687b § 22(b)(4) (1965).

²¹ CAL. VEHICLE CODE § 12810 (West 1960).

²² CAL. VEHICLE CODE § 12810 (West 1960).

schedule violations of traffic laws that do not relate to driving ability. For example, Michigan assesses points for the conviction of any felony offense in which a motor vehicle was used, for failure to appear in court, and for failure to appear for a departmental interview after points have reached the action level. Ohio also assesses points for the conviction of any felony in which a motor vehicle was used. Indiana assesses points for the offense of carrying too many persons in the vehicle and for parking in an area in which parking is prohibited.²³ These offenses do not predict driving failure and therefore are of no utility in point systems.

Participants in Implementation of Point Systems

Point systems must also be compared in terms of the actors involved. For example, in the administration of most point systems the licensing agency assesses the points to the driver record. However, in some states a convicting court assesses the point totals. Thus, in Florida the courts assess points within a statutory minimum and maximum range for each offense described. The licensing agency performs the ministerial function of recording the points assessed. If the court fails to assess points, the licensing agency records the median point value for the particular offense. In Ohio the convicting court records the appropriate point score and forwards a completed report form to the licensing agency maintaining the driver records.

Multiple Offenses in a Single Transaction

In a single transaction involving multiple offenses, is only the more serious offense assessed points? California, Michigan, Ohio, and Pennsylvania so limit the point assessment. In the other states clarification is needed.

Foreign State Convictions

Similarly, a decision must be made whether points will be assessed against driver records upon conviction of motor vehicle offenses in other states and foreign countries. If so, it must be determined what point values will be recorded. Florida provides by statute that foreign convictions "may" be assessed on a one-half point score basis. This could mean either one-half of the median point score for the particular offense or the median point score itself. This unique situation arises out of the fact that in Florida the department does not assess points except when a convicting court fails to do so. In that circumstance the department assesses median points. However, on out-of-state convictions there is no Florida court process permitting the assessment of points. The power of the licensing agency should be clarified under this statute either by

²³ Administrative point schedule published in J. Averitt, POINTS LEVIED CAN COUNT UP FAST, *The Indianapolis News*, May 9, 1966.

amendment or by court interpretation. Michigan provides by statute that out-of-state reckless driving convictions are to be assessed points, but the point value to be recorded is not stated. Presumably the point score for conviction of this offense in the state of Michigan is applied. On the other hand, the Michigan statutes provide that out-of-state bond forfeitures for traffic violations are not to be assessed points. New Jersey assesses foreign convictions at full value in its administratively created point system. Pennsylvania authorizes, but does not require, licensing officials to assess points for out-of-state traffic convictions. If the administrator chooses to exercise this authority, the point values assessed are the same as those that would accrue if the offense were committed in Pennsylvania. The *Uniform Vehicle Code* authorizes, but does not require, the licensing agency to assess points for foreign convictions.²⁴ The policy is not clear in the other states in the study group.

Double Use of Offenses for Point Assessment

Double use of traffic court convictions for driver improvement purposes may be subtly imposed in point system states. This usually occurs when an offense is committed that by statute calls for mandatory license withdrawal. The relevant policy question is whether, in addition to the mandatory license withdrawal, points are also assessed to the driving record. All the point system states appear to permit double use to some degree. In addition to inclusion of broad categories, Michigan, for example, provides specifically for point assessments upon conviction of some offenses for which the license is withdrawn under other statutes. The extent to which such practices prevail will determine the extent to which double use of violations occurs. Relevant *Uniform Vehicle Code* provisions do not consider the issue.

Point Credit for Driver Training or Safe Driving

In New Jersey no direct point credit is given for attending driver improvement school, but successful completion of the school will serve to erase 2 months of any license suspension assessed by the department. In Pennsylvania 1 point credit is given for successful completion of a driver improvement course. Upon reinstatement of a licensee after a suspension period has been served, the point total on his record is reduced to 1 point below the statutory action level. In addition, points are removed from driver records at the rate of 2 points for each year of violation-free driving. This method of crediting licensees for years of violation-free driving is that recommended by the Institute of Government of the University of North Carolina in its 1958 study of point systems.²⁵ Pennsylvania is the only state in the study group that has adopted this recom-

²⁴ UNIFORM VEHICLE CODE § 6-206(b) (1968).

²⁵ DRIVER IMPROVEMENT *supra* note 2, at 245.

mendation. The *Uniform Vehicle Code* does not award point credit for safe driving or attending driver improvement school.

Action Level: Single or Multiple, Mandatory or Discretionary

After the various techniques of point assessment and credit have been applied in a given point system, the predetermined "action level" selects licensees for driver improvement action. The "action level" is nothing more than a specified point total which, when reached, results in selection of that particular licensee through the point system. Action levels may be classed as single or multiple in type. A single action level factor selects on one occasion only, whereas a multiple action level factor selects on several occasions and is related to the general type of driver improvement action that may be expected at each action level. For instance, New Jersey is the only single action level factor state in the study group. There accumulation of 12 points results in selection for whatever driver improvement is deemed appropriate by the department. In the other states the action level is multiple. In California, for example, if the licensee accumulates 3 points in 12 months or 5 points in 24 months or 7 points in 36 months, the department issues a warning letter indicating that the licensee is in danger of license withdrawal. If the California licensee accumulates 4 points in 12 months or 6 points in 24 months or 8 points in 36 months, then his license may be withdrawn. Florida's system is similar except that no action level is established for warning letters. Pennsylvania's mandatory point system requires a warning letter after the accumulation of 3 points, attendance at a driver improvement school or administration of a special examination upon the accumulation of 6 points, and mandatory license withdrawal upon the accumulation of 11 points.

It is also important to ascertain whether reaching the action level results in mandatory or discretionary action on the part of the licensing official. Pennsylvania's system is entirely mandatory, for example. The statutory language in Florida apparently authorizes, but does not require, the department to take license action when the point total reaches the prescribed action level. However, the Florida statute could be read to be mandatory and should be clarified by amendment or court decision. In Ohio a unique situation exists. The statutes impose an obligation on the licensing agency to send warning letters at one action level and institute a "show cause" court hearing for withdrawal of the license at another. However, the court that conducts the "show cause" hearing is given broad discretion. The action of the hearing court may range from allowing the driver to retain the license to its withdrawal.

Opportunity for Administrative or Court Hearing

Once the action level has been reached, the issue arises as to whether the licensee is to be afforded an opportunity for a hearing prior to or

after license suspension. In Florida and Pennsylvania no hearing is required prior to suspension of the license. In California, Indiana, Michigan, New Jersey, New York, and Ohio a hearing prior to suspension is afforded the licensee.

A question related to the hearing concerns what arm of government conducts it. Ohio, as indicated earlier, requires a court hearing on the issue of license suspension. Texas, although not a point-system state, likewise requires a license suspension hearing to be conducted by a "court" consisting of a local mayor or magistrate.²⁶ In all other states in the study group and under the *Uniform Vehicle Code* license suspension hearings are administrative in nature and are conducted by the licensing agency.

Withdrawal: Suspension or Revocation

Assuming the appropriate court or hearing officer determines that license withdrawal action is warranted, it should be ascertained whether he has authority to suspend or revoke the license. Suspension constitutes a temporary withdrawal, whereas revocation constitutes a total and permanent disqualification. After license revocation, a former licensee is treated as an original license applicant in most states. A majority of the study group states implement their point systems by imposing license suspension rather than revocation. However, in some states the court or agency has the authority to suspend or revoke—whichever it chooses. California, Illinois, Indiana, Michigan, and New York statutes appear to allow this choice. Florida, New Jersey, Ohio, Pennsylvania, and the *Uniform Vehicle Code* limit the action to suspension. Although the Indiana statutes appear to permit either suspension or revocation upon administrative hearing, by its administrative point system the licensing agency has limited itself to license suspension. Statements of the licensing agency explaining the administrative point system imply this.

Length of Withdrawal

Again assuming the appropriate court or administrative agency has determined license withdrawal to be appropriate, it should be ascertained for what period of time the withdrawal may be imposed. In some states the period of license withdrawal is prescribed by statute, with no discretion as to its length vested in either the courts or the licensing agency.²⁷ In the other study states the period of withdrawal is discretionary. The maximum is 6 months in California and 1 year in the others.

²⁶ TEX. REV. CIV. STAT. ANN. art 6687b, § 22 (1965).

²⁷ E.g., Florida, Ohio, and Pennsylvania (initial suspension).

Double Use of Points for Successive Suspensions

After completing a period of license withdrawal, the reinstated licensee may ask whether the points leading to the former suspension remain on his record and whether they may be used as the basis for another suspension if additional points accrue. In Ohio it is clear that points used as the basis for a license suspension may not again be used for that purpose. In Florida, New Jersey, and Pennsylvania the structure of the point system permits use of the same points to form part of the basis for a second suspension. The other states and the *Uniform Vehicle Code* do not state whether points may be used twice for suspension. In all of them the potential is there unless it has been eliminated by statutory amendment, administrative policy decision, or court interpretation of the statute.

Extent of Seriousness Ascribed to Similar Offenses by Different States

Because of the different raw point score assessments, the varying action levels, and the varying periods of time over which points are accumulated, a means must be devised to make offenses comparable. The accompanying chart is an attempt to do so.²⁸ By relating the accumulation time period to the license withdrawal action suspension level, the number of points that, if accumulated each year, will result in license withdrawal may be determined. The point value assessed each offense may then be related to that figure and a percentage of the withdrawal action (suspension) level obtained. It is the resulting percentage derived from these calculations that permits comparison of offenses common to the point systems studied. A lower percentage figure indicates less severity under the point system than a higher percentage. For example, the accompanying chart demonstrates that the point systems of Indiana, Michigan, New Jersey, and the recommended point scheme of the Institute of Government of the University of North Carolina treat the offense of reckless driving more severely than do the point systems of California, New York, and Ohio.

SUMMARY

Point systems may be useful techniques to identify drivers who may become involved in accidents in the future. However, too much should not be expected of these systems. Since the statistical analysis of accident records in North Carolina and California indicates low value correlations

²⁸ The chart utilizes the techniques developed by Dr. B. Campbell to present a similar comparison in *DRIVER IMPROVEMENT*, *supra* note 2, at 160, and are used with his permission.

POINT SYSTEMS: COMPARATIVE WEIGHT OF OFFENSES

Item	California			Indiana *	Michigan	New Jersey	New York **	Ohio	Penn- sylvania †	Institute ‡
Accumulation time	1	2	3	2	2	3	1½	2	—	3
Suspension level	4	6	8	10	12	12	6-8	12	11	12
Accumulation rate	4	3	2½	5	6	4	4-5½	6	—	4
Points assessed per offense:										
Reckless driving	2 50%	2 67%	2 75%	6 120%	6 100%	6 150%	3 75%-56%	4 67%	5	6 150%
Drag racing	1 25%	1 33%	1 38%	8 160%	2 33%	6 150%	2 50%-38%	6 100%	—	3 75%
Leaving scene of accident	2 50%	2 67%	2 75%	7 140%	6 100%	8 200%	—	6 100%	—	3 75%
Improper passing on hill or curve	1 25%	1 33%	1 38%	6 120%	3 50%	5 125%	2 50%-38%	2 33%	6	7 175%
Following too closely	1 25%	1 33%	1 38%	4 80%	2 33%	5 125%	3 75%-56%	2 33%	5	7 175%
Failure to yield right-of-way	1 25%	1 33%	1 38%	4 80%	2 33%	3 75%	3 75%-56%	2 33%	5	3 75%
Driving on wrong side of road	1 25%	1 33%	1 38%	5 100%	2 33%	3 75%	2 50%-38%	2 33%	3	7 175%
Failure to signal	1 25%	1 33%	1 38%	3 60%	2 33%	3 75%	2 50%-38%	2 33%	3	7 175%
Other moving violations (not specified)	1 25%	1 33%	1 38%	2 40%	2 33%	3 75%	—	2 33%	—	3 75%

Speeding 25 mph over limit	1 25%	1 33%	1 38%	6 120%	4 67%	6 150%	3 75%-56%	2 33%	6	5 125%
Speeding 15 to 25 mph over limit	1 25%	1 33%	1 38%	3 60%	4 67%	5 125%	3 75%-56%	2 33%	6	5 125%
Speeding 1 to 15 mph over limit	1 25%	1 33%	1 38%	2 40%	2.5 42%	4 100%	3 75%-56%	2 33%	4.5	5 125%

NOTES: All information is as of Spring 1969.

Accumulation time is the period of years during which "action level" points may be assessed.

Suspension level is the total number of points at which suspension is imposed.

Accumulation rate is the number of points per year that if accumulated will lead to suspension (suspension level divided by accumulation time).

The number in italics indicates the *relative severity* of the specific offense in different states; it is the percent of points per year that the specific offense will contribute toward license suspension (number of points for the specific offense divided by the accumulation rate). Values of 100% or more mean that one conviction per year will ultimately lead to suspension.

Only seven of the study states are represented here; Florida, Illinois, and Texas are not included. Texas is omitted because it does not use a point system. Texas and Illinois identify drivers for improvement action on the basis of multiple violations. In Illinois the point system is used only to determine the type of driver improvement action to be taken. The Florida point system is unique and is omitted because it does not offer an illuminating comparison with the other states. Florida's point system allows assessment from a range of points for the offenses listed; if an accident is involved, additional points may be assessed from a second range. The maximum accumulation rate is 12 points per year for a 1- or 1½-year period or 8 points per year for a 3-year period. The discretionary authority to assess points within the two ranges makes statistical analysis unreliable at best.

* Indiana imposes a lower suspension level and a lower accumulation rate on drivers under age 21. The suspension level and accumulation rate for drivers under 21 are 8 points and 4 points respectively. The accumulation time is 2 years for both age groups.

** In New York the suspension level ranges from 6 to 8 points, depending on the judgment of the administrator.

† The Pennsylvania point system is unique in that it does not contain a specified point accumulation time. Once points are added to the record in Pennsylvania, they are removed only upon earning credits that serve to reduce the point total. One point credit is given for successful completion of a driver improvement course, and points are removed from driver records at the rate of 2 points for each year of violation-free driving.

‡ The Institute of Government of the University of North Carolina recommended this point system structure on the basis of its 1958 study of North Carolina driver records.

between traffic offenses and accident involvement, it should not be presumed that offenses or point systems based on offenses predict accurately. Furthermore, there is always the suspicion that point systems may be established by subjective judgment rather than rigorous statistical analysis. Such point systems may have no predictive value and may serve only to limit the need to drive.

In conclusion, the utility of a point system as a highway safety measure depends primarily on an assumption that, up to this point, has not been stated. The assumption, which must be evaluated by empirical research, is that the driver improvement action taken does, in fact, bring about changes in driving performance that will reduce or eliminate the risk of future driver failure. If beneficial effects of driver improvement action based on them cannot be demonstrated, point systems are of no utility as driver surveillance and improvement techniques.²⁹

²⁹ See DRIVER IMPROVEMENT, *supra* note 2, at 13-17.

WITHDRAWAL OF LICENSES: 12 IMPLIED CONSENT STATUTES

In an attempt to find mechanisms to minimize drinking while driving, legislators turned to law enforcement to promote highway safety by emphasizing criminal prosecutions for driving while intoxicated. Thus, implied consent statutes are not predictor policies in the sense that the term has been used herein. On the contrary, they make it easier to secure driving-while-intoxicated (DWI) convictions by providing scientific evidence of driver impairment after the consumption of alcohol. The statute functions quite simply. A statutory presumption of consent to a blood alcohol test is created, and when the prescribed circumstances arise an officer may request a driver to submit to such a test. If he submits, the test results may be used either for or against him in a criminal prosecution. If he refuses the test, his license is withdrawn.

The premise on which implied consent statutes are based is well supported by reliable scientific research. The relationship between alcohol consumption and accidents is summarized as follows:

Scientific investigation of actual crashes and the circumstances in which they occur in laboratory and field experiments show very clearly that the higher a driver's blood alcohol concentration is, the disproportionately greater is the likelihood he will crash, the greater is the likelihood that he himself will have initiated any crash in which he is involved, and the greater is the likelihood that the crash will have been severe.¹

¹ HOUSE COMM. ON PUB. WORKS, 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 90th Cong., 2d Sess. 15 (1968).

Another analysis of the research literature concluded, "These findings demonstrate that alcohol is a very significant contributor to at least fatal accidents."²

Dr. William Haddon, former Administrator of the National Highway Safety Bureau (now NHTSA) concurs: "We have very solid data from a wide variety of locations in this country and elsewhere that alcohol is causally involved in upwards of 50 percent of fatal crashes."³

IMPACT OF IMPLIED CONSENT STATUTES

Assessment of the effect of a sociolegal policy, even though legitimated by an empirically sound premise, is difficult. It cannot be simplistically assumed that implied consent statutes actually contribute to a reduction of driving while intoxicated. The policy must be studied in action, its effects identified, and those effects evaluated.

In an attempt to determine whether available records could help measure the effect of an implied consent statute, to determine the adequacy of those records, and to determine (so far as the records would permit) the effects of adopting an implied consent law, the National Highway Traffic Safety Administration commissioned a study of the Missouri implied consent statutes.⁴ It consisted of a comparative analysis of the enforcement of implied consent statutes in Kansas City and St. Louis, Missouri. The following conclusions were reached: (a) More and better records are needed for meaningful research into the problem of drunken driving, and an accurate index of the extent of drunken driving should be assessed high research priority; (b) the implied consent laws are believed to make the administration of drunken driving laws easier; (c) the study discovered no concrete indication that implied consent statutes alone or in conjunction with other policies reduced drunken driving below levels that would have been experienced in their absence; and (d) the license refusal-revocations system is a potential administrative substitute for the use of the criminal process in dealing with drunken driving.⁵ The authors conclude as follows:

In sum, implied consent helps to rationalize the administration of a process whose central tenets remain unexamined and unproved. Given present information about the magnitude of the problem of drunk driving, and the present assumptions about appropriate drunk-driving policies, implied consent is a modest improvement and seems worth its cost.⁶

² A. LITTLE, INC., *THE STATE OF THE ART OF TRAFFIC SAFETY* 95 (1966).

³ ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, *TRAFFIC SAFETY—A NATIONAL PROBLEM* 13 (1967). *Accord*, R. McFarland, *Alcohol and Highway Accidents: A Summary of Present Knowledge*, POLICE March-April 1966, at 66-68.

⁴ E. Hunvald, Jr., and F. Zimring, *AMERICAN BAR FOUNDATION, MISSOURI IMPLIED CONSENT STATUTES* (1968), also published as *Whatever Happened to Implied Consent? A Sounding*, 33 MISSOURI L. REV. 323 (1968).

⁵ *Id.* at VI Conclusions.

⁶ *Id.*

In another recent study three social scientists utilized a time-series research design to analyze the effect of the British Road Safety Act of 1967.⁷ That legislation involves enforcement techniques similar to American implied consent statutes. Although the time-series research design is quasi-experimental in nature, the authors defend its use as being an effective substitute for a prohibitively expensive or unfeasible pure experiment. They caution that the policy evaluator must know the limits of the research techniques used and must proceed sensibly rather than mechanically. Applying this research model to the British experience, the authors conclude: "Critical scrutiny of the data indicates that in this instance the legal change quite impressively achieved its goal."⁸

Although these initial studies are not conclusive, they are sufficient to suggest the utility of implied consent statutes as sociolegal policies that, to some extent, achieve the results for which they were designed.

CONSTITUTIONALITY OF IMPLIED CONSENT STATUTES

Despite statements to the contrary, the U. S. Supreme Court has not yet ruled on the constitutionality of implied consent statutes.⁹ However, Mr. Justice Clark commented favorably on implied consent statutes in the majority opinion in *Breithaupt v. Abram*.¹⁰ Furthermore, the Court's majority opinion in *Schmerber v. California*¹¹ implied that the concept is constitutionally acceptable. In neither of these cases was an implied consent statute directly involved in the constitutional challenge to convictions for driving while intoxicated. In the *Breithaupt* case a physician withdrew blood from the body of an unconscious person who had been involved in an automobile accident where there was a strong suspicion that he had been driving while intoxicated. In *Schmerber*, blood was withdrawn by a hospital physician despite verbal protestations of the defendant that to do so was a violation of his constitutional rights.

Four constitutional principles have been asserted as grounds for declaring such withdrawal of blood violative of the U.S. Constitution. It has been asserted that it constitutes a denial of due process of law, that it compels self-incrimination (because the evidence obtained may be used in a criminal prosecution) in violation of the federal privilege, that it denies right of counsel, and that it constitutes an unreasonable search or seizure in violation of the fourth amendment to the U.S. Constitution.

⁷ H. ROSS, D. CAMPBELL, G. GLASS, UNIVERSITY OF COLORADO LABORATORY OF EDUCATIONAL RESEARCH, *THE BRITISH CRACKDOWN ON DRINKING AND DRIVING: A SUCCESSFUL LEGAL REFORM* (1969).

⁸ *Id.* at 1.

⁹ Such a statement is made in *Hearings on S. 1467 Before the Subcomm. on Roads of the Senate Comm. on Public Works*, 90th Cong., 1st Sess. 329 (1967).

¹⁰ 352 U.S. 432, 435 N.2 (1957).

¹¹ 384 U.S. 757 (1966).

Due Process of Law

The assertion that withdrawal of substances from the human body may violate due process of law was explored by the U. S. Supreme Court in the cases of *Rochin v. California*¹² and *Breithaupt v. Abram*.¹³ In *Rochin*, state officers entered the bedroom of the defendant, who was suspected of narcotics violations. Several capsules were noted on a side table, and the defendant was asked what they were. He quickly grabbed and swallowed the capsules, thereby frustrating efforts of the officers to examine them. While the defendant was attempting to swallow the capsules the officers struggled with him in an unsuccessful attempt to obtain them. The defendant was then taken to a hospital where an emetic was administered, and his stomach was pumped. The capsules were discovered to contain narcotics, and the evidence thus obtained was used in a criminal prosecution for the offense of illegal possession of narcotics. The conviction was affirmed by the California Supreme Court despite the method by which the evidence was obtained, and the U.S. Supreme Court agreed to consider the case.

The Court's unanimous decision that the conviction should be reversed was based on due process of law. At that time (1952) state violation of the federal privilege against self-incrimination and the federal protection against unreasonable searches and seizures was not relevant to the case. It was within the state's authority in a criminal prosecution to admit evidence obtained in violation of the federal standards. In short, the federal standards applicable to the privilege against self-incrimination and freedom from unreasonable searches and seizures had not been imposed on the states through the provisions of the 14th amendment.¹⁴

Therefore, Mr. Justice Frankfurter's opinion in *Rochin* emphasized the concept of due process of law. Regardless of the fact that the evidence was undoubtedly reliable, the Court stated that the evidence was inadmissible under the due process clause of the 14th amendment. The reason given was that it was obtained by coercion and that coercion offends the community's sense of fair play and decency. In summary, Mr. Justice Frankfurter indicated that the method of obtaining this evidence "shocks the conscience."¹⁵

A due process of law objection to searches of the human body again came before the Court 5 years later in *Breithaupt*. In that case blood was withdrawn from an unconscious person in a hospital by a physician at the instruction of a police officer. An analysis of the blood indicated that it contained alcohol in a sufficiently high percentage to justify its use as presumptive evidence that the defendant had been driving a motor

¹² 342 U.S. 165 (1952).

¹³ 352 U.S. 432 (1957).

¹⁴ *Wolf v. Colorado*, 338 U.S. 25 (1949); *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908).

¹⁵ *Rochin v. California*, 342 U.S. 165, 172 (1952).

vehicle while in an intoxicated condition in violation of New Mexico statutes. The defendant challenged his conviction on the grounds that the use of the evidence obtained was not only a denial of due process of law, but that it also violated the fourth amendment protection against unreasonable searches and seizures and the fifth amendment privilege against self-incrimination. However, the Supreme Court rejected both the search and seizure and self-incrimination arguments on the basis of its decision in *Wolf v. Colorado*,¹⁶ which it refused to overrule. *Wolf* had reaffirmed the rule that federal search and seizure and self-incrimination standards do not apply to state prosecutions. Hence, these allegations were disposed of summarily.

The Court's decision, therefore, considered primarily the principle of due process fairness that had succeeded in the earlier *Rochin* stomach-pumping case. However, the majority opinion of Mr. Justice Clark distinguished the *Rochin* case on the ground that the taking of blood by the methods employed involved nothing "brutal" or "offensive" as was true of *Rochin*. The Court rejected unconsciousness as an objection on the ground that "the absence of conscious consent, without more, does not necessarily render the taking a violation of a constitutional right."¹⁷ At this point in his opinion Mr. Justice Clark makes a footnote reference to the implied consent statute of the state of Kansas.¹⁸

When tested by the "whole community sense"¹⁹ of decency and fairness, the majority concluded that this extraction of blood does not offend its sense of fair play and decency. Blood test procedures were said to have become routine in everyday life. However, the Court added a qualification: "This is not to say that the indiscriminate taking of blood under different conditions or by those not competent to do so may not amount to such 'brutality' as would come under the *Rochin* rule."²⁰

The three dissenters indicated they would reverse the conviction on the *Rochin* rationale. Emphasizing the lack of affirmative consent to withdrawal of the blood, they concluded that only personal reaction to the stomach pump and the blood test could distinguish the two cases. They would stop the efforts of law enforcement officers to obtain evidence short of "bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."²¹ They believed this to be necessary to protect the human personality and individuality that the Bill of Rights is designed to secure.

The limited utility of the due process clause as a constitutional basis for attacking nonviolent blood withdrawal was reaffirmed as an aspect of the Court's opinion in *Schmerber v. California*.²² At the outset of the

¹⁶ 338 U.S. 25 (1949).

¹⁷ 352 U.S. 432, 435 (1957).

¹⁸ *Id.* at n. 2.

¹⁹ *Id.* at 436.

²⁰ *Id.* at 437-38.

²¹ *Id.* at 442 (dissenting opinion of Mr. Chief Justice Warren).

²² 384 U.S. 757 (1966).

majority opinion Mr. Justice Brennan stated that it makes no difference whether the suspect specifically objects to a test, resorts to physical violence in protest, or is in such condition that he is unable to protest. However, he implies that the community's sense of fair play and decency would be violated and due process of law denied (a) if police initiated the violence as in *Rochin*, (b) if police refused to respect a reasonable request to undergo a different form of testing, or (c) if police responded to resistance with inappropriate force.²³ It is doubtful that police will initiate violence to secure blood or respond to resistance with force in the administration of implied consent statutes. Most of the statutes provide that if a licensee refuses the test, then no test shall be given. However, according to the Court, due process of law may be denied if police refuse to respect a "reasonable request to undergo a different form of testing"²⁴ where there is no suggestion of any force or violence. Aside from barring the use of blood test evidence in a criminal prosecution, this due process of law requirement is quite important to the license withdrawal portion of implied consent statutes. For example, refusal of police to respect a reasonable request for another form of testing, if established at an administrative hearing following refusal of the test, may serve to prevent the licensing agency from withdrawing the license.

Privilege Against Self-Incrimination

In the intervening 9 years between the decisions in *Breithaupt* and *Schmerber*, the Court determined that the federal protections against compulsory self-incrimination and unreasonable search and seizures were applicable to the states through the provisions of the 14th amendment.²⁵ Thus, where *Rochin* and *Breithaupt* disposed of these issues rather summarily, they were of primacy in *Schmerber*.

The facts of *Schmerber* were similar to those of *Breithaupt*. The police officer investigating an accident concluded that the driver of the vehicle might have been intoxicated, for he exhibited physical manifestations of intoxication and his breath smelled of alcohol. Sometime later the police officer again noted these symptoms upon observing the defendant at a hospital. At that time he placed the defendant under arrest and warned him of his constitutional right to remain silent, his right to counsel, and told him that anything he said might be used against him in court. The officer then requested the defendant to submit to a blood test to determine the alcoholic content of his blood, but the defendant refused on the advice of counsel. Nonetheless, but without violence and under hospital conditions, a physician withdrew blood from the body of the defendant. The blood analysis was used as evidence in a DWI prosecution. The California courts sustained the conviction that resulted, and the defendant

²³ *Id.* at 760, n. 4.

²⁴ *Id.*

²⁵ *Malloy v. Hogan*, 378 U.S. 1 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961).

sought review by the U.S. Supreme Court. The constitutional issues raised by the defendant before the Court included (a) denial of due process of law, (b) violation of the privilege against self-incrimination, (c) denial of the right to counsel, and (d) securing evidence by means of an unreasonable search or seizure.

As has been indicated, the majority opinion disposed of the due process of law contention on the basis of *Breithaupt*. The self-incrimination contention was disposed of by limiting the privilege against self-incrimination to testimonial utterances. Although the majority admitted that there is some element of compulsion involved in taking a blood test over the objection of a suspect, it emphasized the distinction between testimonial and real evidence and concluded that compulsion to submit to an attempt to discover real evidence is not within the privilege.²⁶

Right to Counsel

The argument that the constitutional right to counsel had been denied was disposed of, in part, on the basis of the self-incrimination issue. The claimed denial of right to counsel was said to be strictly limited to the privilege against self-incrimination and to no other right the accused might possess. On this matter the defendant had, in fact, been advised by counsel. Having already disposed of the self-incrimination argument, the Court said the right to counsel contention must also fall.²⁷ However, the Court's language is carefully limited. For example, no argument was made to the Court that, when a blood test is requested, the accused must have access to counsel in order to make effective his protection against unreasonable searches and seizures.

Unreasonable Search or Seizure

Is a Search Permissible?—The essence of the *Schmerber* decision is that any constitutional limitations on nonviolent blood testing must be based on the prohibition against unreasonable searches and seizures. The initial question that must be considered in a blood test search is whether *any* search is justified under the circumstances. The *Schmerber* majority stated that the cases generally describing the authority to search as an incident to arrest "have little applicability" to searches "beyond the body's surface" because of interests in human dignity and privacy.²⁸ Therefore, to permit "any such intrusions" the search must not be made on the "mere chance" that desired evidence might be obtained, but that there must be "a clear indication that in fact such evidence will be found."²⁹ Thus, to make

²⁶ 384 U.S. 757, 761-64 (1966).

²⁷ *Id.* at 765.

²⁸ *Id.* at 769-70.

²⁹ *Id.* at 770.

a blood test search, higher standards of search justification must be met. The officer who conducts the blood test search without a warrant as an incident of an arrest must meet the higher standards applicable to searches "beyond the body's surface."

The majority refused to distinguish between searches of dwellings and searches of the human body as to search warrant requirements. Absent an emergency, the decision whether a search involving "an intrusion into the human body" is justified should be made by a "neutral and detached magistrate." The Court stressed the importance of a neutral decision to search where the body is to be invaded.³⁰ The detached judgment is to be made on the basis of the more stringent standards described and not the standards applicable to ordinary searches not involving intrusions into the body. However, the Court would permit a blood test search to be made where destruction of evidence might occur if the search were not made immediately. If the delay in locating a magistrate and securing a search warrant would result in destruction of evidence, the Court indicated that an emergency is created, and the search may be made as an appropriate incident to arrest.³¹ Nonetheless, since the Court specifically makes search warrant requirements applicable to blood test searches, if a magistrate is available, the officer may be required to obtain a search warrant even though there is a "clear indication that in fact such evidence will be found." The availability of a magistrate *eliminates* the legal emergency, and a search warrant is required. Read otherwise, the Court's insistence on a detached opinion justifying a search within the body would be meaningless.

Was the Search Reasonable Under the Circumstances?—If it is determined that a blood test search is justified, the next consideration is the reasonableness of the test offered. The majority indicates that it might require police compliance with a request for another type of test by persons who fear blood tests, persons who have religious scruples against blood tests, and persons whose health might be endangered by blood tests.³² This facet of the search and seizure argument overlaps the due process of law qualifications described earlier. The request for another type of test may be based on due process of law or unreasonable search and seizure principles.

Another aspect of the reasonableness of the search involves the administration of the test. In *Schmerber* there was no difficulty, for blood was withdrawn by a physician in a hospital. However, the majority states it would not be permissible to administer *any* type of test involving a *medical technique* under unsanitary conditions or by improperly trained persons.³³

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 771.

³³ *Id.* at 771-72.

CONCLUSIONS AS TO FEDERAL CONSTITUTIONALITY

The decisions of the U.S. Supreme Court concluding with *Schmerber* indicate that implied consent statutes are conceptually in accord with federal constitutional requirements. However, their very nature and the search and seizure rationale of *Schmerber* indicate that the statutes may be unconstitutionally applied.

Due Process of Law

Due process may serve as a basis for setting aside the withdrawal of a license for refusal of the test offered if police refuse a reasonable request for another method of testing.

Unreasonable Search or Seizure

A blood test search may be unreasonable and unconstitutional (a) if there is no clear indication that in fact evidence would be found and the test is made on the mere chance that it might be found; (b) if the search warrant affidavit does not indicate the magistrate applied the higher standards that are required for searches beneath the body's surface; (c) if no emergency justifying search without a warrant exists, for a magistrate is available to exercise detached judgment; (d) if the police refuse a request for another form of testing; or (e) if the particular type of test administered is not done so in a medically approved fashion by properly trained persons.

Right to Counsel Reconsidered

In addition to the specific limitations on blood test searches set forth in U.S. Supreme Court opinions, the potential importance of a claim of right to counsel *during* the application of implied consent statutes should not be overlooked. As is evident from the preceding discussion, the protection of one's privacy against unlawful intrusion into the body by police depends in large measure on a sophisticated citizenry. Is it reasonable to assume that a layman is capable of detecting deviations from constitutional standards when an implied consent statute is being applied to him? In short, is it to be required that laymen must become experts in the law of search and seizure and the rationale of the *Schmerber* case? The large majority of applications of implied consent statutes will occur at times when an attorney is not immediately available. Upon giving due consideration to the realities of the administration of implied consent statutes, it may be necessary for the Court to insist on access to counsel in such cases to make effective the limitations it has set forth in *Schmerber*. The majority opinion in *Schmerber* concludes with the following statement:

It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.³⁴

Manifestly, evaluation of *each application* of implied consent statutes is required to determine whether there has been compliance with the standards established by the Supreme Court.

APPLICATION OF SCHMERBER TO WITHDRAWAL OF THE LICENSE FOR REFUSAL OF THE TEST

If *Schmerber* prohibits blood test evidence in criminal prosecutions where that evidence was obtained illegally, is the state to be permitted to use a *refusal* to submit to such illegal action as the basis for withdrawing the license? Is government to be permitted to do this in a highly mobile society in which the private motor vehicle is the primary mode of individual movement?

State courts should construe implied consent statutes as limiting consent to those blood test searches that are performed in accordance with the standards established in *Schmerber*. Of course, it may be anticipated that the intellectually bankrupt "driving is a privilege" doctrine will be asserted to justify withdrawal of licenses for refusal of a test regardless of the limitations and conditions prescribed by the Supreme Court. The "privilege" doctrine was applied to the operation of motor vehicles as early as 1913,³⁵ but the trend of cases in recent years has been to discard it because of growing recognition of the importance of the motor vehicle in the life of the average citizen. Thus, driving a motor vehicle has been more recently characterized as a "right" or "liberty" in order to afford it the protection of due process of law.³⁶ It is sufficient to state, as some

³⁴ *Id.* at 772.

³⁵ *People v. Rosenheimer*, 209 N.Y. 115, 102 N.E. 530 (1913).

³⁶ *E.g.*, Colorado: *People v. Nothaus*, 147 Col. 210, 363 P.2d 180 (1961); Georgia: *Nelson v. State*, 87 Ga. App. 644, 75 S.E.2d 39 (1953); Idaho: *State v. Kouni*, 58 Idaho 493, 76 P.2d 917 (1938); Minnesota: *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959); New Jersey: *Bechler v. Parsekian*, 36 N.J. 242, 176 A.2d 470 (1961); Kantor v. Parsekian, 72, N.J. Super. 588, 179 A.2d 21 (1962); New York: *Wignall v. Fletcher*, 303 N.Y. 435, 103 N.E.2d 728 (1952); *Moore v. MacDuff*, 309 N.Y. 35, 127 N.E.2d 741 (1955); *Schutt v. MacDuff*, 205 Misc. 43, 127 N.Y.S.2d 116 (1954); *Herkel v. Kelley*, 14 Misc. 2d 966, 180 N.Y.S.2d 353 (1958); North Carolina: *In re Wright*, 228 N.C. 584, 46 S.E.2d 696 (1948); *Harrel v. Scheidt*, 243 N.C. 735, 92 S.E.2d 182 (1956); Rhode Island: *Berberian v. Lussier*, 87 R.I. 226, 139 A.2d 869 (1958); South Dakota: *State v. Swanson*, 70 S.D. 313, 17 N.W.2d 303 (1945); Virginia: *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930); however, the later Virginia decisions do not follow this case despite the fact that it is an excellent statement of a modern philosophy of motor vehicle operation,

courts have, that whether driving a motor vehicle is characterized as a "privilege," or "right," or "liberty," it is of enough importance to the individual that it cannot be denied or withdrawn by means that are not consonant with due process of law.³⁷

Furthermore, there is reason to believe that state courts may no longer have the authority to classify motor vehicle operation as a privilege and conveniently avoid difficult constitutional questions. In a series of cases the Supreme Court has given constitutional recognition and protection to the individual's interest in freedom of movement.³⁸ The Court has said that the right to travel occupies a position fundamental to the concept of the Federal Union and that it is a right so elementary to the concept of a stronger Union that it finds no explicit mention in the Constitution.³⁹ It cannot be doubted that 100 million licensees operating private motor vehicles exemplify the predominant expression of this constitutional right. Loss of mobility on the basis of fictionalized consent to blood test searches and buttressed by the privilege concept is not to be lightly implied.⁴⁰ Another reason for insisting on the application of *Schmerber* standards to license withdrawal following refusal of the test is that government is not permitted to condition enjoyment of a government-connected interest by a rule requiring abstinence from the exercise of some individual interest protected by the Constitution.⁴¹

Finally, it may be asserted that to withdraw licenses for test refusal without establishing police compliance with *Schmerber* standards constitutes a denial of due process of law in itself for failure to afford an adequate hearing on the constitutional issues that could be raised. If there is a waiver of constitutional rights, that waiver occurs when the licensee neglects or decides not to request a hearing following receipt of notice that his license is to be withdrawn for refusal to submit to the blood test search. The waiver cannot occur in advance of the search by reason of a clever legal fiction. Otherwise, *Schmerber* does not protect licensees who refuse body searches.

Absent an administrative hearing that affords opportunity to dispute

³⁷ E.g., *State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6, 12-13 (1959).

³⁸ E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Kent v. Dulles*, 357 U.S. 116 (1958); *Edwards v. California*, 314 U.S. 160 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *United States v. Wheeler*, 254 U.S. 281 (1920); *Williams v. Fears*, 179 U.S. 270 (1900); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). See generally J. REESE, *THE LEGAL NATURE OF A DRIVER'S LICENSE* (1965).

³⁹ *United States v. Guest*, 383 U.S. 745 (1966).

⁴⁰ See L. Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C.L. REV. 34, 102 (1966). Compare *Fay v. Noia*, 372 U.S. 391 (1963).

⁴¹ W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law* 81 HARV. L. REV. 1446 (1969); see also J. Weinstein, *Statute Compelling Submission to a Chemical Test for Intoxication*, 45 J. CRIM. L. 541, 547 (1955).

the sufficiency of police compliance with *Schmerber* standards, only an opportunity for full de novo court review of the license withdrawal action should suffice to sustain it under the federal Constitution.⁴²

VALIDITY OF IMPLIED CONSENT STATUTES UNDER STATE CONSTITUTIONS

Our federal structure requires implied consent statutes to pass muster under state constitutional provisions as well as federal. The federal standards established in *Schmerber* are, in effect, minimum standards for the protection of the integrity of an individual's person. The states may not permit less. However, because of their quasi-sovereignty, the states have the power to establish even higher standards of protection for individual privacy and dignity. Therefore, any state could embellish the *Schmerber* standards or create an independent scheme of limitations.

As in the case of federal constitutional law, it must be first decided whether a state will permit blood test searches as a matter of general legislative policy. Contrary to the opinion of the U. S. Supreme Court, states may choose not to limit the privilege against self-incrimination to testimonial utterances. If the state privilege is extended to include the production of blood test evidence, the implied consent concept may fall. Oklahoma and Texas are states in which the privilege against self-incrimination may be applicable to blood test searches.⁴³ Of course, the simplistic answer to this reasoning is that protection against compulsory self-incrimination is waived when the license is accepted or a vehicle is operated on the state highway. The justification for the waiver is that driving a motor vehicle is a mere privilege and is not constitutionally protected. State courts that accept this superficial analysis may sustain the constitutionality of implied consent statutes on the basis of *Schmerber* despite broad self-incrimination protection under state law. Is this possible, however, in view of expressions of the Supreme Court that freedom of movement is protected by the federal Constitution?⁴⁴ If driving a motor vehicle is recognized as the primary means by which that freedom of movement is expressed, driver licensing is also protected. Of course, constitutional protection of driver licensing does not deny the states power to refuse to license or to withdraw the licenses of persons who are identified as poor safety risks. The significance of federal constitutional protection of licensing is simply to require state governments to treat license applicants and licensees fairly.

To catalog all the state constitutional issues that might be raised with respect to implied consent statutes will not be attempted. An attack

⁴² *Nickey v. State of Mississippi*, 292 U.S. 393 (1934).

⁴³ See, e.g., Comment, *Constitutional Law: Schmerber v. California—Blood and the Constitution* 4 TULSA L.J. 246 (1967); R. Williams, *Admissibility and Constitutionality of Chemical Intoxication Tests*, 35 TEX. L. REV. 813 (1957); compare M. Slough and P. Wilson, *Alcohol and the Motorist: Practical and Legal Problems of Testing*, 44 MINN. L. REV. 673, 687 (1960).

⁴⁴ U.S. Supreme Court cases so indicating are collected *supra* note 38.

based on the state privilege against self-incrimination is merely illustrative. The state law of arrest,⁴⁵ search and seizure,⁴⁶ equal protection of the laws, and due process of law also afford possibilities.

If it is assumed that implied consent statutes are substantively in accord with the state constitution, there remains the question whether it has been applied constitutionally in each case. Constitutional administration raises at the state level the same issues that were discussed with respect to federal constitutional requirements under *Schmerber*. It must not be forgotten that states have the power to establish higher standards of administration than the U. S. Supreme Court has established.⁴⁷ One example should suffice. State law may require that evidence obtained in a search conducted as incident to an arrest must relate to the offense for which the accused was arrested. In at least two of the study states (California and Florida) the implied consent statutes permit arrest for *any offense* allegedly committed while driving under the influence of intoxicating liquor. If a driver is arrested for the offense of careless driving or speeding and not for DWI, the officer may not be authorized to conduct a blood search for evidence of its alcohol content.

SUMMARY AS TO FEDERAL AND STATE CONSTITUTIONALITY

Implied consent statutes appear to meet federal and most state substantive constitutional requirements. Although the Supreme Court has not ruled directly on the question, *Breithaupt* and *Schmerber* indicate they are valid. They may also be expected to be upheld by state courts either on the basis of *Schmerber* or the time-worn privilege doctrine. Most state courts cannot be depended on to impose *higher* standards than *Schmerber* despite their power to do so.

However, it must again be stressed that constitutional *application* of implied consent statutes in accordance with the *Schmerber* standards necessitates continual monitoring of their application to prevent drivers' licenses from being withdrawn in violation of constitutional principles. If the monitoring function is not effective, perhaps legislatures that require a DWI conviction to justify implied consent withdrawal will have done a better job of protecting licensee interests.⁴⁸

⁴⁵ *E.g.*, if an officer arrives at the scene of an accident without observing the suspect drive the motor vehicle he may be required to obtain an arrest warrant if the offense is a misdemeanor rather than a felony. Meanwhile, the alcohol will have dissipated from the blood. One solution may be to arrest on a subterfuge, *i.e.*, for being drunk in a public place. See J. Weinstein, *supra* note 41, at 550.

⁴⁶ *E.g.*, if the state has no warrant procedure for body searches, *Schmerber* may require the state to allow the evidence to disappear if a magistrate is available.

⁴⁷ *Johnson v. New Jersey*, 384 U.S. 719, 733 (1966): "Of course, States are still entirely free to effectuate under their own law stricter standards than those we have laid down and to apply those standards in a broader range of cases than is required by this decision."

⁴⁸ Colorado requires conviction. The Texas statute, enacted after this analysis was made, also requires conviction.

COMPARATIVE ANALYSIS OF IMPLIED CONSENT STATUTES IN THE STUDY STATES

Implied consent statutes constitute part of the driver license withdrawal scheme in six of the states in the study group and in the *Uniform Vehicle Code*.⁴⁹ At the time this analysis was made Illinois, Indiana, Pennsylvania, and Texas had not enacted such statutes, but Pennsylvania and Texas have since done so.

Persons to Whom Applicable

Six states have adopted implied consent statutes; in five of them and the *UVC* they are applicable to anyone who *operates* a motor vehicle. Hence, the statute is applicable to nonresidents who drive in the state, nonlicensed persons who drive, and persons who drive while under license suspension or revocation. In Florida the statute applies to "any person who shall accept the privilege extended by the laws of the state of operating a motor vehicle within this state."⁵⁰ It is arguable that the Florida statute is applicable only to drivers licensed in Florida and nonresident drivers who operate vehicles within the state. This coverage provision should be amended or clarified by court interpretation. Another section of the statute states that persons who operate vehicles in a status exempt from licensing are within the implied consent statute.⁵¹ In view of the holding of the Supreme Court in *Johnson v. Maryland*,⁵² imposition of an implied consent statute on federal officials operating on federal government business may be unconstitutional.

Areas in Which Applicable

Three statutes and the *UVC* apply to motor vehicle operation on highways. In the other three the statute is applicable as follows: "[W]ithin this state. . . ."; "[O]r quasi-public area. . . ."; and "[I]n this state. . . ." Whether the state legislature has the authority to make the statute applicable to the operation of motor vehicles in nonpublic areas may be subject to question.

Types of Tests Given

Characteristic of implied consent statutes is the type of test (or tests) to which consent is given and exceptions thereto. In California and

⁴⁹ CAL. VEHICLE CODE § 13353 (West 1960); FLA. STAT. ANN. § 322.261 (1965); MICH. STAT. ANN. § 2325 (1, 3-7) (1967); N.J. STAT. ANN. § 39:4-50.2-.5 (1961); N.Y. VEH. & TRAF. § 1194 (McKinney 1960); OHIO REV. CODE ANN. § 4511.191 (Page 1965); UNIFORM VEHICLE CODE § 6-205.1 (1968).

⁵⁰ FLA. STAT. ANN. § 322.261(1)(a) (1965).

⁵¹ FLA. STAT. ANN. § 322.261(1)(j) (1965).

⁵² 254 U.S. 51 (1920).

Ohio and under the *UVC*, consent is given to blood, breath, and urine tests, and to that list New York adds saliva and Michigan adds "other body substances." In Florida consent is given to breath, urine, or saliva tests, but not a test of the blood unless the individual is so incapacitated that one of the other three cannot be given. In New Jersey operators consent only to a test of breath.

In California persons suffering from hemophilia and heart patients using anticoagulant drugs under the direction of a physician are exempt from blood testing. Michigan likewise exempts from blood testing hemophiliacs, persons receiving anticoagulant drugs under the direction of a physician, and, in addition, diabetics. Under the *Schmerber* standards, some choice of test is probably required in the administration of the statute but constitutionality does not necessarily require statutory specification of a right of choice. Is a right of choice afforded in the four states whose statutes do not indicate any test exceptions? Are exceptions and choices in addition to those contained in the statutes afforded in California and Michigan?

Purpose of Consent

In all of the study group states and the *UVC*, consent to chemical testing is given for the purpose of determining the alcoholic content of the blood. It is this element of the statute that provides the rational relationship between the licensing goal of preventing driver failure and the means chosen by which to achieve that goal. One of the few scientifically validated withdrawal predictor policies is the conclusion that accident risk is increased appreciably upon consumption of alcoholic beverages. Carefully constructed empirical studies indicate that a causal relationship exists.⁵³ Therefore, public policy measures designed to remove these debilitated drivers from the highways are justifiable on a scientific basis and not mere safety "folklore."

In addition to alcohol the New York statutes state that consent is also given for the purpose of determining the drug content of the blood. The scientific evidence of a causal relationship between drug use and accident involvement is much less satisfactory. In fact, as has been mentioned elsewhere, there is evidence that users of illegal drugs do not present any greater risk than the average driver.⁵⁴ Inability to predict accident involvement on the basis of drug usage suggests that there may be no rational relationship between that predictor and highway safety. If driver licensing is a manifestation of the constitutionally protected right to travel, it may be appropriate to declare unconstitutional this portion of the New York implied consent statute. Is there justification for searching the blood to determine drug content when the resulting

⁵³ See authorities cited *supra* notes 1-3.

⁵⁴ J. Waller, *Chronic Medical Conditions and Traffic Safety*, 273 NEW ENGLAND JOURNAL OF MEDICINE No. 26, at 1413-1420 (1965).

prediction may be entirely fortuitous? Of course, if it is reliably established by controlled research that certain drug levels in the blood impair driving ability, no objection should be raised. Even so, withdrawal of the license for driving under the influence of drugs must be carefully controlled, for the use of drugs as prescribed by a physician may enhance driving ability and serve to promote the cause of preventing human failure.⁵⁵ Hence, it should not be assumed that the mere presence of drugs in the blood necessarily indicates impaired driving ability. The New York statutes do not contain a blood drug level identifying the presumptive legal impairment point nor do they provide consideration for those who use drugs legitimately under the supervision of a physician.

Requirement of Arrest and Its Scope

Another important element of implied consent statutes is the arrest provision. In three of the study group states the statute requires arrest for driving while intoxicated or under the influence of liquor or while driving ability is impaired because of consumption of alcohol. However, in California and Florida and under the *UVC* officers are permitted to arrest drivers for *any offense* allegedly committed while driving under the influence of alcohol or while intoxicated. The New York statute is not specific on the grounds for arrest. The significance of the California and Florida arrest provisions is that an officer may arrest for careless driving or speeding or some other offense not necessarily related to driving while intoxicated. If, on the basis of that arrest, he requests submission to blood testing, it is arguable that the evidence obtained would be inadmissible in court on grounds that the purpose of the search did not relate to the offense that justified it. Such a general search may violate the fourth amendment to the federal Constitution, or it may violate state search and seizure law.

Reasonable Grounds to Believe Drunkenness or Impairment

The statutes of all the study group states and the *UVC* require an officer to have "reasonable grounds" or "reasonable cause" to believe the operator of the vehicle was driving "while intoxicated" or "under the influence" or "while impaired" in order to make an arrest. In all of the states the reasonableness of the officer's belief may be tested in the administrative hearing following refusal of the test.

Withdrawal of Consent if Unconscious

An implied consent statute should indicate whether consent is withdrawn if the suspect is unconscious. In three of the states and under

⁵⁵ W. Haddon, in *ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM* (1967).

the provisions of the *UVC* the statutes provide that unconsciousness does not constitute withdrawal of consent and testing may proceed. In California the officer chooses the test to be administered and is excused from warning the unconscious suspect of the effect of refusing a test. In Florida the officer may administer a blood test if it is impossible or impracticable for him to administer a test of another type. The fact of unconsciousness should raise no federal constitutional issue in view of Supreme Court decisions.

Advising Suspect of Choices and Consequences of Refusal

Must the suspect be advised of the choices available to him and the consequences of refusing the test? In all the study group states the arrested person must be so advised. This advice is quite important in states that offer choices of tests, a right to the copy of the official test results, the right to demand an official test, and the right to have a test made by one's own physician. Ohio formalizes the advice by a written form supplied by the licensing agency that must be read to the licensee and witnessed by a third party. However, the *Uniform Vehicle Code* does not require that the suspect be so advised.

A Choice of Tests by the Suspect

Does the arresting officer designate the test to be administered or does the suspect have a choice of tests? Of the study group states only California allows the suspect a choice from among blood, breath, and urine tests. Michigan permits the licensee to demand that only a breath test be given. In the other four states the test appears to be chosen by the arresting officer, with the *UVC* providing that it be designated by the law enforcement agency. Nevertheless, the statutory language may not be controlling in view of the statements in *Schmerber* that it could be a denial of due process of law or constitute an unreasonable search or seizure to refuse a reasonable request to undergo another form of testing.

Right of Suspect to Demand a Test

May the suspect demand a test be given even though the officer does not request one? In three of the study group states the suspect may do so.⁵⁶ The statutes of the other three states and the *UVC* are silent on this point.⁵⁷ Such a provision affords the person accused of drunken driving an opportunity to create, through objective testing, evidence that may be used in his defense in the event of a criminal prosecution. If the test results are negative, they may serve to secure an immediate release without a formal charge of DWI being made.

⁵⁶ California, Florida, Michigan.

⁵⁷ New Jersey, New York, Ohio.

Right to an Additional Test by Personal Physicians

In the event an official test is given, may the suspect also have a test made by a physician of his choice? In five of the study group states the accused may have such a test made. The Ohio statute and the *UVC* do not mention this point:

Right to Results of the Official Test

May the suspect have the results of the official test made available to him? In four of the study group states the results are made available. Michigan and Ohio statutes and the provisions of the *UVC* do not mention this point.

Effect of Refusal of the Test

If a test is refused, will it be administered over the objection of the suspect? To do so is treading dangerous ground, for it was the taking of evidence from the body by force that caused reversal of the conviction in *Rochin*. Despite its importance the implied consent statutes of California and Florida merely *imply* that no test will be given over the suspect's objection. The four remaining study group states and the *Uniform Vehicle Code* specifically *require* that no test will be given over the objection of the suspect. Presumably, California and Florida police officers do not risk running afoul of *Rochin*. However, *Schmerber* implied that reasonable force to overcome resistance is acceptable.⁵⁸

Officer Required to File Sworn Report

In the event of refusal of a test, in all six study group states and under the *UVC* the arresting officer is required to file a sworn report with the licensing agency. The content of the report varies from state to state, but generally it includes a statement of the reasonable grounds for belief that the suspect was driving while intoxicated or "impaired," that the suspect was arrested, and that he refused to submit to a test. At least two states require the officer to indicate that he advised the suspect of his right to refuse the test or the consequences of a refusal.⁵⁹ The New Jersey report requirement is more general than the others and requires a statement of the circumstances surrounding the arrest and the grounds on which the belief of driving while intoxicated was based.

License Withdrawn Unless Hearing Is Requested

The implied consent statutes of all the study states require withdrawal of the license upon receipt of the arresting officer's sworn report unless

⁵⁸ 384 U.S. 757, 760 (1966).

⁵⁹ Michigan, Ohio.

a hearing is requested by the licensee. Although the *UVC* does not specifically mention this point, it does provide for immediate revocation. In New York the Commissioner of Motor Vehicles is authorized, but not required, to suspend the license temporarily and without notice. The statute does not specify that the licensee may insist that he be allowed to drive pending the outcome of a requested hearing if the Commissioner exercises this temporary suspension authority. In the other five study states the license is not withdrawn until after the requested hearing has been held and a determination made.

Who Conducts the Hearing?

In Florida the hearing, if requested, is conducted by the court having trial jurisdiction of the criminal offense charged. In Ohio the hearing is conducted by a municipal, county, or juvenile court, as appropriate. In the other four states and under the *UVC* the hearing is conducted by the licensing agency.

Scope of the Hearing

It is the hearing stage of the withdrawal process that is most likely to fail to afford the protections prescribed by the Supreme Court in *Schmerber*. The scope of the hearing must allow the licensee an opportunity to test whether the arresting officer complied with those standards, despite the attempts of some legislatures to limit the scope of the hearing. In all the study group states and under the *UVC* the reasonableness of the grounds for the belief that the licensee was driving while intoxicated or "impaired" is in issue. Likewise, in all the states and under the *UVC* the fact of arrest is in issue. Similarly, in all the states the fact of refusal of a test is in issue at the hearing. Michigan is the only state in which the reasonableness of the refusal is an issue in the hearing. Finally, five of the six states place in issue the matter of whether the accused was advised of his rights or of the consequences of refusal. The New Jersey statute does not indicate this to be an issue and the *UVC* specifically states that it is not an issue.

Ordinarily, there is authority in the agency or court to exercise its judgment to structure the issues in an administrative hearing. However, in some implied consent statutes there is an attempt to narrow the scope of the hearing and reduce the issues to a perfunctory level. If successful, the effect is to limit the power of the agency or court to allow the licensee to continue to drive. For instance, the Michigan and Ohio statutes specify that the hearing shall be *limited* to the issues set forth in the statute. A similar limitation may arise by implication from the statutes in the other states. Nevertheless, the *Schmerber* standards of constitutional application must be met if the license withdrawal is to be constitutional. It is the responsibility of hearing officers and hearing courts to consider all the constitutional issues that *Schmerber*

makes pertinent and to use their transferred power to make certain that the valuable individual interest in retaining the driver's license is adequately protected.

Burden of Proof

Unfortunately, none of the statutes studied indicates on whom the burden of proof rests in the administrative hearing. If it is construed to be a "show cause" hearing, the burden of establishing improper action under the statute will probably fall upon the licensee. Failure to do so will, of course, result in loss of the license. On the other hand, if the burden of proof is placed on the licensing agency or the state (in Florida and Ohio where the hearing is conducted by a court), the government will be required to establish compliance with statutory and constitutional requirements. The statutes should be amended or construed by the state courts to clarify the burden of proof issue. Another possibility is to refer to the administrative procedure legislation of the state. Like the federal counterpart, the state legislation may provide that the burden of proof in an administrative hearing is on the "proponent of the order" that is sought.⁶⁰ Since it is the state that proposes to withdraw the driver's license, the state is the proponent of the administrative order and should bear the burden of proof in the hearing. Unfortunately, the administrative procedure legislation of all the states leaves this question unanswered. Professor Cooper suggests that state courts impose the burden on the agency in circumstances such as implied consent hearings.⁶¹

Transferred Power to Decide Not to Withdraw the License

What is the scope of the hearing officer's decision power with respect to withdrawal? All the states and the *Uniform Vehicle Code* vest in the agency or court sufficient authority to allow the licensee to retain his license. This power exists even though the statutes are designed to make license withdrawal a virtual certainty upon refusal to submit to a test.

For example, in California this transferred power arises from the phrase "If the department determines upon a hearing of the matter to suspend. . . ." ⁶² In Florida power is transferred by the phrase "[i]f such court determines upon such hearing that the suspension herein provided is according to law and should be sustained. . . ." ⁶³ In Michigan the statute provides simply "After the hearing, the secretary may suspend. . . ." ⁶⁴ In New Jersey power is vested in the agency as

⁶⁰ 5 U.S.C.A. 556(d) (1967).

⁶¹ I F. COOPER, STATE ADMINISTRATIVE LAW 355 (1965).

⁶² CAL. VEHICLE CODE § 13353(c) (West 1960).

⁶³ FLA. STAT. ANN. § 322.261(1)(f) (1965).

⁶⁴ MICH. STAT. ANN. § 9.2325(6) (3) (1967).

follows: "[I]f after a hearing the director shall find against the person on such issues, he shall revoke such person's license. . . ." ⁶⁵ The New York statute does not describe the authority of the agency but provides simply for an opportunity for hearing. If the Ohio court conducting the hearing determines the licensee has "shown error in the action taken by the registrar of motor vehicles . . . the suspension provided . . . shall not be imposed." ⁶⁶

Length of Withdrawal

For how long is the license withdrawn? In five of the study states and under the *UVC* the license is suspended for 6 months. In Michigan the suspension may range from a period of 90 days to 2 years. ⁶⁷

Requirement of Uniform Application

California and Florida require the adoption of uniform standards and approved methods of administration of the statutes. Michigan authorizes its Department of Public Health to adopt rules for establishing blood test standards. New Jersey requires the methods of testing to be those approved by its Attorney General and further that only those persons certified by the Attorney General may administer the test. The New York statute provides that it shall be administered in accordance with the rules and regulations of the police force of which the officer is a member. The Ohio statute and the *UVC* are silent on this point. However, it is not necessary that policies for the administration of a statute be based on an express statutory provision. Administrative officials in the six study states may implement these statutes on the basis of their general power to make rules and regulations to enforce driver licensing statutes. ⁶⁸ In view of the many legal questions that require clarification or that may arise in the process of applying implied consent statutes, they should not fail to do so.

⁶⁵ N.J. STAT. ANN. § 39; 4-50.4 (1961).

⁶⁶ OHIO REV. CODE ANN. § 4511.191(G) (Page 1965).

⁶⁷ MICH. STAT. ANN. § 9.2325(6)(3) (1967). The agency rules and regulations do not indicate how it determines for what period of time the license should be suspended. How this discretionary authority is used should be clarified in rules or regulations.

⁶⁸ CAL. VEHICLE CODE § 1651 (West 1960); FLA. STAT. ANN. § 322.02, 322.27(2)(i) (1965); ILL. ANN. STAT. ch. 95½, §§ 6A-109(a), 6A-211 (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-2405, 47-2708, 47-2910 (Burns 1966); MICH. STAT. ANN. § 9.1904(b) (1967); N.J. STAT. ANN. §§ 39:3-10.1, 39:3-11.3, 39:3-15.1 (1961); N.Y. VEH. & TRAF. §§ 207(3), 215 (McKinney 1960); OHIO REV. CODE ANN. §§ 4501.02, 4507.01, 4507.05, 4507.09, 4507.11, 4507.21, 4507.25 (Page 1965).

13

RESTORATION OF THE LICENSE

ROUTINE METHODS OF RESTORATION

In a motor-vehicle-oriented society, drivers whose licenses have been withdrawn have an obvious interest in reacquiring them. The most obvious method of restoration of the license is to refrain from driving for the term of withdrawal and then follow the prescribed procedures to have the license reissued. After a license has been withdrawn, some states impose a requirement that the driver be reexamined as to his qualifications.¹ The *Uniform Vehicle Code* imposes upon the licensing agency the obligation to make an "investigation of the character, habits and driving ability of such person" who seeks to obtain a new license after his license has been revoked.² An investigation of "driving ability" should be sufficient. Of what relevance to future driving failure are the "character" and "habits" of the license applicant? If adopted as a state statute, this provision might well be held unconstitutional for lack of rational relevance to preventing driver failure. Obviously, other administrative routine is involved in the process of restoring the license of one who has suffered its withdrawal. However, most of it is perfunctory and irrelevant to this analysis. It is the aberrational techniques of license restoral that are of interest.

ABERRATIONAL METHODS OF LICENSE RESTORAL

One obvious form of "restoration" of the license may occur where the criteria for withdrawal are met but the power-holding agency of

¹ E.g., OHIO REV. CODE ANN. § 4507.41 (Page 1965).

² UNIFORM VEHICLE CODE § 6-208 (1968).

government is authorized to subvert the selection-prediction scheme by placing the licensee on probation and imposing driving restrictions. Withdrawal of the license will not have occurred, and in that sense the license may be said to have been "restored."

Another variation on the same theme may occur where the licensing agency or the court is authorized to reinstate the license upon request without a requirement that extenuating circumstances be shown. Three of the study group states have provided for this type of relief.³

In one of the three states the power to entertain petitions for a probationary license is vested in the courts.⁴ In most states agencies and courts may be expected to possess the authority to impose restrictions on such probationary licenses. Those restrictions may consist of limitations on the route to be traveled, the purpose of the trip, the time of operation, or similar constraints.

There is yet another variation on the theme of restoring the license with utter disregard of the prediction system. That is the practice of issuing what are known as "hardship" or "occupational" licenses. For this concept to apply, the applicant must demonstrate that being forbidden to drive a motor vehicle will result in dire economic consequences for himself or his family. California requires the applicant to show that withdrawal of the license will "affect the livelihood" because of the nature of employment.⁵ Florida requires the applicant to show "serious hardship,"⁶ whereas Illinois and Indiana require a showing that "undue hardship" will result.⁷ As in the case of probationary licenses, power may be vested in either the licensing agency or a court. Of primary concern is the fact that the statutory language does not contain the criteria for determining whether any "hardship" exists and, if so, whether it is "serious" or "undue." If the licensing agency is the power holder, rules and regulations may be promulgated stating the criteria of judgment to be applied. However, where the power is vested in courts, no such requirement may be imposed.

Many licensing officials object to the issuance of licenses on any of these grounds. They assert that such licenses are aberrational because they disregard the public interest in preventing driver failure and afford unwarranted protection of individual liberty at the expense of other individuals on the highways. The unarticulated premise on which this objection is based is the assumption that the predictor policies structured into current driver selection systems are accurate in identifying those drivers who should be removed from the roads. However, as has been

³ CAL. VEHICLE CODE §§ 14110, 14250 (West 1960); FLA. STAT. ANN. § 322.28 (1965); OHIO REV. CODE ANN. § 4507.41 (point system) (Page 1965).

⁴ OHIO REV. CODE ANN. § 4507.41 (point system) (Page 1965).

⁵ CAL. VEHICLE CODE § 13210 (West 1960).

⁶ FLA. STAT. ANN. § 322.271(2) (1965).

⁷ ILL. ANN. STAT. ch. 95½, § 6A-205, 206(c) (Smith-Hurd 1958); IND. ANN. STAT. § 47-2721 (Burns 1966).

stated repeatedly, empirical research has not established a high degree of reliability for any single predictor used with the exception of alcohol. If the premise of the argument is thus destroyed, restoring licenses by these techniques is not really objectionable on grounds of safety. Conversely, the social and economic significance of the motor vehicle contends for recognition of the individual interest in driving. Legislatures that allow probationary and hardship licensing may not know that the predictor policies of driver selection systems are not scientifically valid; nevertheless, they may be demonstrating good judgment in providing a means for restoring licenses that would otherwise be withdrawn. As was suggested earlier, perhaps an expanded scheme of restricted licensing would be as effective as withdrawal or denial of licenses on the basis of most predictor policies currently used.

Therefore, it does not follow that probationary or hardship licensing is improper. It is clear that these statutory provisions for license restoral indicate formal governmental recognition of the importance of motor vehicles in contemporary American society. Some states go so far as to permit hardship licensing where withdrawal of the license is made mandatory.⁸ It may take the form of "probation" awarded or recommended by the convicting court.⁹ Such formal legislative policies tend to destroy the simplistic idea that driving a motor vehicle is a "privilege," which permits licensees to be dealt with severely on the basis of safety "folklore." The concept of hardship licensing is particularly incongruous in states where the courts have formally stated that driving is a "privilege."¹⁰ If driving is a privilege, why adopt hardship licensing programs? If hardship licensing programs exist, is licensing really a privilege as the courts say?

Current licensing criteria should be used primarily for diagnostic purposes to identify drivers who should, perhaps, be given remedial treatment.¹¹ However, current predictor policies (excepting alcohol consumption) should not be used to deprive individuals of their need to drive.¹² To continue to do so accomplishes little for highway safety and serves primarily as a form of unjustified punishment. In several instances not only is the predictor policy poor science, it is also poor law. At some point, such poor policy becomes an intolerable burden, and the interests of PEOPLE will prevail. In several respects driver licensing systems and their administration may have arrived at that point.

⁸ *E.g.*, ILL. ANN. STAT. ch. 95½, § 6A-205 (Smith-Hurd 1958).

⁹ *E.g.*, CAL. VEHICLE CODE § 13210 (West 1960) (after first conviction of misdemeanor drunk driving the court may order agency not to withdraw the license); IND. ANN. STAT. § 47-2721 (Burns 1966).

¹⁰ *E.g.*, Jones v. Kirkman 138 So. 2d 513 (Fla. 1962); People v. Thompson, 225 Ill. App. 567 (1922); Commonwealth v. Halterman, 192 Pa. Super. 379, 162 A.2d 251 (1960).

¹¹ Panel report in INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT 254-55 (1968).

¹² *Id.* See also SPINDLETOP RESEARCH, DRIVER LICENSING AND PERFORMANCE Report 224 (1969).

14 THE FEDERAL ROLE

In 1966 the U.S. Congress lost patience with the attempts of state governments to create highway safety programs, despite the tradition that highway safety is primarily a matter of local concern.¹ After at least 40 years of exhortation to cooperate and structure uniform and comprehensive safety programs,² the states remained divided in their approaches

¹ The congressional attitude is subtly revealed in the *Hearings on S.3052 Before the Subcomm. on Public Roads of the Comm. on Public Works*, 89th Cong., 2d Sess. (1966). *E.g.*, at 7:

Our survey of present highway safety efforts throughout the Nation clearly shows that Federal, State, and local efforts have proceeded separately with little or no coordination and that major gaps and weaknesses exist in present programs, Statement of John T. Connor, Secretary of Commerce. More specific is H.R. Rep. No. 1700 on the Highway Safety Act of 1966, 89th Cong., 2d Session (1966):

The Committee on Public Works maintained diligent contact with the Department of Commerce, anxious to learn what progress the Secretary was making in his conferences with the States for the development of standards for the voluntary highway safety programs the amended section 135 encouraged the States to establish. [Baldwin Amendment.] There was no real progress.

Id. at 4.

For 40 years the various safety-related organizations, both public and private, have been trying to persuade the several State legislatures to adopt at least minimum uniform regulatory statutes, with lamentable lack of success.

Id. at 6.

² H.R. REP. NO. 1700 on the Highway Safety Act of 1966, 89th Cong., 2d Sess. 6 (1966). When he was Secretary of Commerce, Herbert Hoover called a large number of interested groups to attend a National Conference on Street and Highway Safety. Eight study committees were at work on the problem for 6 months in advance of the Conference. Findings and a consolidated report were prepared by the Conference after its deliberations. In 1926, the Conference was convened again to consider interim

to the problem. State highway safety programs were extremely diverse as to areas of coverage. And where coverage was similar, the standards were often different.³

In his 1966 Transportation Message to the Congress,⁴ the President described motor vehicle accident losses in lives, personal injury, and property damage as a national problem, second in magnitude only to the Viet Nam War.⁵ His characterizations seemed to provide the catalyst that quickly produced a congressional consensus that the federal government should intervene. Congress recognized that it is fallacious to perceive highway accidents as local problems, properly subject to local authority. Further, Congress concluded that the hitherto piecemeal methods were not a sensible manner in which to attack the highway safety problem, even if arguably local in nature.⁶ Hence the Congress concerned itself with developing legislation combining two premises: (a) Highway safety is a national concern, and (b) all facets of the highway transportation system having a safety implication should be dealt with systematically. Therefore, vehicle, roadway, and driver would receive

work of committees. The 1926 Conference approved a suggested model for a "uniform vehicle code," which had been prepared by the Committee on Uniformity of Laws and Regulations. This "code" consisted of three separate acts covering registration and certification of title, licensing of operators and chauffeurs, and rules governing the operation of vehicles on highways. The three acts were recommended to the states for adoption. These documents were later combined into a *Uniform Vehicle Code*, likewise recommended to the states. It has been maintained and amended through the years and is currently in the custodianship of the National Committee on Uniform Traffic Laws and Ordinances. It was last revised in 1968. H.R. Doc. No. 93, *THE FEDERAL ROLE IN HIGHWAY SAFETY*, 86th Cong., 1st Sess. 12-13 (1959). In the interim, in 1926 the National Conference of Commissioners on Uniform State Laws approved the act covering licensing of operators and chauffeurs under the title "Uniform Motor Vehicle Operators' and Chauffeurs' License Act" and recommended it to the states. It was revised in 1930. However, in 1943 the Conference of Commissioners declared it "obsolete" and "no longer recommended for adoption." *HANDBOOK OF THE NATIONAL CONFERENCE* 69 (1943). For its text, see 11 *UNIFORM LAWS ANNOTATED* 75-97 (1938).

³ The diversity as to both coverage and standards is apparent upon cursory examination of the volumes in the series entitled *Traffic Laws Annual*, published by the National Committee on Uniform Traffic Laws and Ordinances. See also H.R. REP. NO. 1700, *HIGHWAY SAFETY ACT OF 1966*, 89th Cong., 2d Sess., at 2 (1966).

⁴ N.Y. Times, Mar. 3, 1966, at 20.

⁵ *Id.*; accord, Statement of Howard Pyle, President, National Safety Council, *Hearings supra* note 1, at 82.

⁶ H.R. REP. NO. 1700, *HIGHWAY SAFETY ACT OF 1966*, 89th Cong., 2d Sess. '6 (1966). S. REP. NO. 1302, *THE HIGHWAY SAFETY ACT OF 1966*, June 23, 1966, at 3, 6, 7, 15. See also *Hearings supra* note 1 at 1-2, 63-64 (Statement of Herbert J. Bingham, Executive Secretary, Tennessee Municipal League); 65 (Statement of J. O. Mattson, President, Automotive Safety Foundation); 81-82 (Statement of Howard Pyle, President, National Safety Council); 116 (Statement of William G. Johnson, General Manager, National Safety Council); 162-163 (Statement of William Randolph Hearst, Jr., Chairman, President's Committee for Traffic Safety); 223 (Statement of Senator Randolph, Committee Chairman). Accord, H.R. Doc. No. 93, 86th Cong. 1st Sess., *THE FEDERAL ROLE IN HIGHWAY SAFETY* at 11, 142, 145 (1959).

attention in terms of their relation to the safety aspects of "highway transportation."⁷

The problems of safety in vehicle design and vehicle safety appliances were treated in the Motor Vehicle and Traffic Safety Act,⁸ whereas roadway and drivers were dealt with in the Highway Safety Act.⁹ Housed in the Department of Transportation is the legislatively created National Highway Traffic Safety Administration, formerly known as the National Highway Safety Bureau,¹⁰ which has responsibility for administering the provisions of the Highway Safety Act of 1966. The Secretary of Transportation is required to carry out the provisions of the Act through the NHTSA, whose director is appointed by the President with the advice and consent of the Senate.¹¹

The power transferred to the Secretary by the Highway Safety Act is not formally of the same type as that vested in the Civil Service Commission to control federal officials. Civil Service has power to prescribe requirements directly applicable to persons who operate certain motor vehicles for prescribed purposes. Under the Highway Safety Act the Secretary of Transportation does not possess direct regulatory authority over individuals, but the manner in which the statutory program is structured and the available sanctions imply that his power will indirectly affect individuals who operate motor vehicles.

The effect on PEOPLE is indirect because the Secretary's power is directed at the states as political entities and not at persons. Its essence is contained in the following expression:

Each State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary.¹²

The primary transfer of power occurs with the granting of the authority to (a) prescribe "uniform standards" for state highway safety programs and (b) approve or disapprove state programs in terms of those standards. The Secretary is further directed to address the uniform standards to these goals: (a) "To improve driver performance" [including but not limited to education, testing, examinations, and licensing], and (b) "[T]o improve pedestrian performance. . . ." More specifically, his uniform standards are to include, but are not limited to,

. . . an effective record system of accidents (including injuries and deaths resulting therefrom) accident investigations to determine the prob-

⁷ *Id.*

⁸ 80 Stat. 718 (1966).

⁹ 80 Stat. 731 (1966).

¹⁰ Dep't of Transportation Act, 80 Stat. 931, § 3(f)(2) at 932; Federal Aid Highway Act of 1970, P.L. 91-605, 84 Stat. 1713, approved Dec. 31, 1970, tit. II, § 201.

¹¹ *Id.*

¹² Highway Safety Act of 1966, 80 Stat. 731, § 402(a).

able causes of accidents, injuries, and deaths vehicle registration, operation, and inspection highway design and maintenance (include lighting, markings, and surface treatment) traffic control vehicle codes and laws surveillance of traffic for detection and correction of high or potentially high accident locations. . . .¹³

Because of the imprecision of the term "highway safety," the administrator determines the goals as well as the methods by which they are to be achieved. The basic statutory qualification on the standards power is the requirement that they be "uniform." Presumably such standards will be based on empirical research of good design with appropriate controls.¹⁴

Until research results are forthcoming we must frankly recognize that government will continue to make legal policy in this field largely on the basis of personal opinion and the "folklore" of highway safety. However, the decision to implement federal highway safety programs immediately is not to be criticized, for if *complete* empirical understanding is awaited, nothing may be accomplished.¹⁵

Furthermore, the emphasis on empiricism suggests there should be no hesitation to question the validity of the standards. Policies are not necessarily valid or effective simply because the collected value judgments labeled "accepted practice" are believed by some persons to describe criteria relevant to highway safety.

Other than the empirical orientations implied in the congressional *Reports* and *Hearings* and the uniformity requirement, the sole statutory control on the Secretary's authority is that "Such uniform standards shall be expressed in terms of performance criteria."¹⁶ The phrase "performance criteria" could serve as a very important limitation because it suggests objectivity, quantification, and empiricism and might not permit the promulgation of standards that are essentially subjective and moralis-

¹³ *Id.*

¹⁴ There is abundant commentary that current highway safety "knowledge" is based on research that is nonempirical, or out-of-date, or both. For a sample of such comment examine the following: H.R. Doc. No. 93, 86th Cong., 1st Sess., *THE FEDERAL ROLE IN HIGHWAY SAFETY* at 8, 121, 141, 142, 147 (1959):

Through enlargement and orderly refinement of the body of fundamental knowledge concerning high accidents will come opportunities for deeper insight, for formulation and testing of accident causes by hypothesis, and for practical development of means for safer street and highway travel;

H.R. REP. No. 1700, Highway Safety Act of 1966, 89th Cong., 2d Sess. 26 (1966); S. REP. No. 1302, Highway Safety Act of 1966, 89th Cong., 2d Sess. (1966) at 3, 6, 14, 15; *Hearings supra* note 1 at 7, 8, 10, 50, 85, 104, 111, 131, 142, 222 (1966); *Hearings on S. 1467 Before the Subcomm. on Public Roads of the Comm. on Public Works—Authorization Bill for Highway Beautification and Safety Programs*, 90th Cong., 1st Sess., at 180, 205, 328, 332, 335 (1967).

¹⁵ W. Haddon, former Administrator of the National Highway Safety Bureau, in *INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DRIVER BEHAVIOR—CAUSE AND EFFECT* 17 (1968); and in *ENO FOUNDATION FOR HIGHWAY TRAFFIC CONTROL, TRAFFIC SAFETY—A NATIONAL PROBLEM* 6 (1967).

¹⁶ Highway Safety Act of 1966, 80 Stat. 731, § 402(a).

tic.¹⁷ It could describe the outer limit of the Secretary's authority. What cannot be stated in the form of "performance criteria" is arguably an invalid, *ultra vires* standard that may not be imposed on the states. Perhaps Congress recognized that objectivity and subjectivity are two entirely different concepts of measurement and deliberately chose the former.

On the other hand, perhaps the Secretary has the power to adopt even subjective uniform standards so long as he expresses them in terms of the performance criteria by which they are to be met.¹⁸

A third possibility is that the phrase "performance criteria" impliedly requires something more than a mere rational relationship between the uniform standards promulgated and the vaguely stated goal of "highway safety."¹⁹

Other power bases contained in the legislation include authority "to the extent deemed appropriate by the Secretary"²⁰ to apply the standards to federally administered areas where a federal department or agency

¹⁷ The phrase was given no attention in S. REP. No. 1302 on S. 3052 or the Senate hearings on S. 3052. The most precise statement as to its meaning appears at page 8 of H.R. REP. No. 1700, Highway Safety Act of 1966, 89th Cong., 2d Sess.:

Section 402(a) in the bill requires that the standards shall be expressed in terms of performance criteria—that is, they must be written in language sufficiently specific to be susceptible of evaluation as to their success or failure in actual application under the State programs. We have had enough of broad generalized recommendations. It is time to get down to business.

In describing (to the National Highway Safety Advisory Committee, which was created by § 404 of the Highway Safety Act of 1966) the initial standards to be promulgated, the Under Secretary of Transportation stated the fundamental policies to be followed. One of them was:

The modified standards are written in terms of performance criteria as required by the law. They represent a safety performance level or goal to be achieved and do not attempt to set any particular specifications on how the States are to meet these goals. . . .

quoted in *Hearings on S. 1467 before the Subcomm. on Public Roads of the Comm. on Public Works—Authorization Bill for Highway Beautification and Highway Safety Programs*, 90th Cong., 1st Sess. 176 (1967). See also testimony of William Haddon at 180.

¹⁸ This interpretation seems questionable, however, in the light of a portion of the language of H.R. REP. No. 1700 quoted *supra* note 17. That portion is: "They must be written in language sufficiently specific to be susceptible of evaluation as to their success or failure in actual application. . . ." This suggests that the standards (a) must relate to highway safety and (b) must be capable of being evaluated in terms of the extent to which they contribute to reducing injuries and loss of life on the highways. A precise but *subjective* standard is difficult, if not impossible, to evaluate in *objective* terms. An *objective* or quantifiable standard is amenable to a more accurate evaluation.

¹⁹ *Id.* Evaluation in terms of "success or failure" in accomplishing the goal of highway safety arguably requires more than a mere subjective judgment that a relation does, in fact, exist. Also, the new equal protection principle that requires a "compelling state interest" to regulated fundamental freedoms may apply. See *Shapiro v. Thompson*, 394 U.S. 618 (1969), where interstate travel was held to be a constitutional right. Admittedly, equal protection clauses do not apply to states. *E.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

²⁰ 80 Stat. 731, § 402(a) (1966).

controls the highways or supervises traffic conditions. The phrase "extent deemed appropriate" gives the Secretary highway safety authority over federally administered areas.²¹

Additional power was given the Secretary by the statutory provisions that permitted him to apportion 25 percent of the funds appropriated to carry out the state highway safety programs "as the Secretary in his administrative discretion may deem appropriate" for the fiscal years ending June 30 of 1967, 1968, and 1969.²² No control was placed on his power over this portion of the funds. After 1969, funds must be apportioned on the basis of a nondiscretionary formula.²³

As sanctions applicable to noncomplying states after December 31, 1968, the statute provides "the Secretary shall not apportion any [safety] funds . . . to any State which is not implementing a highway safety program approved by the Secretary in accordance with this section."²⁴ Another sanction is that after January 1, 1969, states not "implementing" an approved program will lose 10 percent of the federal-aid highway funds they otherwise would have received until such time as they are implementing an approved program.²⁵ The authority to determine what constitutes "implementing" resides in the Secretary. Furthermore, whenever he determines it to be in the public interest the Secretary may suspend, for such periods as he deems necessary, the application of this 10 percent reduction of federal-aid highway funds.²⁶ Apparently, he has almost complete authority to waive this sanction. "Public interest" is not an effective control standard over any determination he makes, and there is no control on the time period that he might deem "necessary."

Such potentially powerful financial sanctions put the Secretary in a rather persuasive position vis-à-vis recalcitrant states. He has available both carrot and stick techniques to secure compliance with his "uniform standards." However, the existence of this awesome power to secure compliance or cut off funds does not necessarily mean that the Secretary should or will, in fact, use it.²⁷

The final instance of transferred power appears in § 206 of Title II of the Act.²⁸ This provision instructs the Secretary to give priority to state federal-aid highway projects "which incorporate improved standards and features with safety benefits."²⁹ Such priorities will be, in reality, based

²¹ *Id.*

²² 80 Stat. 731, § 402(c) (1966).

²³ *Id.*

²⁴ *Id.* In 1968, deadlines were extended for 1 year: 82 Stat. 654 (1968).

²⁵ *Id.* Federal-aid highway funds are administered under authority of the provisions of 23 U.S.C. 104 (1964). See also *supra* note 24.

²⁶ 80 Stat. 731, § 402(c) (1966).

²⁷ Secretary Volpe has indicated he may withhold funds from recalcitrant states. See *Safety Hassle*, *The Wall Street Journal*, June 17, 1969, at 1.

²⁸ 80 Stat. 731, title II. This section amends 23 U.S.C. 105 by adding subsection "e" (1966).

²⁹ 23 U.S.C. 105 (1964).

on the Secretary's judgment as to what constitutes "improved standards" of highway design and what highway features incorporate "safety benefits."

Of course, this cursory commentary and analysis of the National Highway Traffic Safety Administration does not describe adequately its program and policies. A detailed analysis of the NHTSA's predecessor, the NHTSB, and the program it developed is given elsewhere.³⁰

³⁰ J. REESE, *The Federal Highway Safety Act of 1966: NHTSB Driver Licensing Standard—Power Not Used*, 47 DENVER L. J. 408 (1971).

PART III

PEOPLE

INTRODUCTION TO PART III

The men who created the United States did so on the basis of a philosophy or ideology of government. That ideology comprises the unseen foundation on which our political institutions are anchored. Because there is a functional identity between a political ideology and its institutions, it is important to consider briefly the ideological environment out of which the United States arose.

In describing American political ideology, primary attention must be given to the English philosopher John Locke, for his political views dominated the period of the American revolution. Locke's influence in the American colonies was pervasive. His books were circulated here and many Americans learned of him at British universities. The central theme and thrust of his political philosophy is that of balancing the power of majority rule to protect the collective interests of all the people against the individual's desire to freely pursue his own interests. In other words, there is a continuing struggle in society to strike an acceptable balance between POWER (authority-duty) and PEOPLE (liberty-right). Locke implies that democracy contains two elements of check on assertions of governmental power: a procedural check (majority or consensus rule) and a substantive check (use of power must relate to public need and must not unduly abridge individual liberty). Both must be accounted for somewhere in the legal-policy decision process.

The Declaration of Independence is drawn heavily from Locke. Some went so far as to accuse Jefferson of copying Locke's *Second Treatise of Government*. Similarly, the federal Bill of Rights and the bills of rights of the state constitutions are American techniques for protecting individ-

ual interests in life, liberty, and estate. As heirs of Locke, we are provided the conceptual framework necessary to balance order and freedom.

Applying the Locke philosophy, American courts have recognized certain individual interests of PEOPLE as valuable and deserving of protection from unlimited invasion by governmental assertions of POWER. Perhaps use of the motor vehicle has evolved into such a valuable interest. The initial step in assessing the propriety of the current POWER-POLICY-PEOPLE balance relative to the motor vehicle is to describe its place in American society. Unless the relevant social facts are identified and described, can there be a rational assessment of sociolegal policies applicable to motor vehicle operation? Three discussion areas will be considered: sociology, economics, and sociolegal policy.

15 A SOCIAL PROFILE OF THE MOTOR VEHICLE

SOCIOLOGY

A sociologist suggests that the history of human settlement should be viewed as a process of expansion of the territorial unit in which men live. The process is said to consist of the growth of the service and administrative center followed by enlargement of the area subject to the influence of the service and administrative center.¹ Thus viewed, urban life is of comparatively late origin, for in 1800 there were only 21 places in the world with a population of 100,000 or more, none of which were in America. In fact, at that time America had only six places of 8,000 or more people. However, by the end of the 19th century the world had at least 800 places with populations of over 100,000.² Obviously, the 19th century was a period of massive city growth.

Meanwhile, the same technological revolution that was to produce the motor vehicle brought about separation of employment from the home. The place of work and the place of living were divided, but there could not be great distances between them for there was no efficient means of transport from place to place. The effect was to continue the emphasis on creating compact core areas of high population densities and vertical building. There was also a sharp dividing line between city and country, urban and rural, with an accompanying anti-urban tradition fostered by the writings of Jefferson, Thoreau, Emerson, and others. The city was depicted as a place of artificiality, sin, turmoil, and cynicism.³

¹ Hawley, *Social Factors and the Pattern of Urban Growth*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION, transcript, at 5-6 (1962).

² *Id.*

³ *Id.* at 7.

Finally, technology offered a degree of relief by providing the electric street railway, which permitted greater home-to-work distances and thus a larger "60-minute radius." A recent Stanford Research Institute study found that "the location, shape, and size of cities thus have been a function of the form of transportation system prevailing during its main period of growth."⁴ It recognized that, as new transportation modes are made available, the new growth of the city tends to orient itself toward those modes. This adding of new growth, based on a different transportation system, is said to produce irregularities and paradoxes in the city structure that can be explained only by reference to the evolution of transportation during the city's life history.⁵

Accordingly, the electric streetcar introduced the mass transit effect of radial growth from the core area along main arteries with continued high population densities along those corridors, but within the "60-minute radius." In 1890 it required 30 to 45 minutes for people who lived 3 miles from the core area to get there by streetcar.⁶ Certainly the city and its problems were paramount in the minds of those who lived there, but in order that perspective not be lost, let us remind ourselves that in 1900 two of every three Americans lived outside metropolitan areas⁷ and the nation as a whole was of a rural orientation.

The fruition of motor vehicle experimentation into a reasonably efficient and reliable machine in the first decade of the 20th century, along with development of mass-production techniques and Ford's introduction of the Model T in 1908, meant that city dwellers had available an instrument for revolutionary social change, provided there were facilities on which to operate it. As the city streets were extended and surfaced, the "60-minute radius" became greater, and with continuing technical improvement in both vehicle and road it continued to expand. On the other hand, when the great road-building projects that linked farms and villages to the cities were completed, the farmer was released from his isolation. Another means of communication, a potential for the exchange of ideas, had been made available to both, and the stage was set for mass population shifts.

Once basic facilities were available, the freedom offered by the motor vehicle is most often mentioned as the sociological reason for the mass movement of city dwellers to suburbia, because the extended "60-minute radius" now encompassed an area four or five times as large as before.⁸

⁴ ALLEN AND McELYEA, *IMPACT OF IMPROVED HIGHWAYS ON THE ECONOMY OF THE UNITED STATES* 86 (1958).

⁵ *Id.*

⁶ Bostick, *The Automobile in American Daily Life*, 32 PUBLIC ROADS 241 (1963).

⁷ THE COMMITTEE FOR ECONOMIC DEVELOPMENT, *DEVELOPING METROPOLITAN TRANSPORTATION POLICIES* 18 (1965).

⁸ Hawley, *supra* note 1, at 9; KETTERING AND ORTH, *THE NEW NECESSITY* 22 (1932); Mylroie, *Predicting the Public's Changing Appetite for Better Transportation Facilities and Services*, PLANNING TOMORROW'S STREET AND HIGHWAY SYSTEM 72 (1960); RECK, *foreword to A CAR TRAVELING PEOPLE* (1960 ed.); accord, BORTH, *The Automobile*:

It was possible to live still further from one's employment and yet travel the distance in the same time. The efficiency, flexibility, and convenience of the motor vehicle made possible "urban sprawl," and eventually use of the phrase "metropolitan area" became appropriate to describe the great cities and their surrounding suburbs. Yet, a compensating force moving in the opposite direction also existed. If the city dweller wanted to escape from the noise, crowd, and smoke of the city, or simply find a better place to rear children,⁹ the farmer wanted to move in the opposite direction and enjoy some of the advantages of the city he had been denied. Upon inquiring why a farm family owned a car when it did not own a bathtub, a government official was told simply, "Why, you can't go to town in a bathtub."¹⁰

Obviously, the motor vehicle provides an essential function as part of the nation's transportation system. Railroads, airplanes, and ships supply the remaining portions. Among the four modes listed, the motor vehicle is unique for its flexibility, convenience, and individual operation and should be recognized accordingly. However, for many years the motor vehicle was not considered part of the transportation system, in part because of its characteristics. World War I led to its taxation as a luxury because the horse and buggy was still predominant. On the other hand, World War II erased any doubt that might have existed about the nation's dependence on the motor vehicle. In 1940, when war threatened, the federal government commissioned a study by a group of engineers to determine whether the motor vehicle should be considered a luxury as before. The study found that 60 percent of the defense workers would need motor vehicles to get to and from work, and at least 29 million vehicles would have to be kept in service. Under no circumstances could the number be permitted to fall below 20 million. Part of the purpose of rationing gasoline and tires and setting a 35 mile-per-hour speed limit was to conserve vehicles and keep them operating.¹¹

Some argue that motor vehicles are choking large metropolitan areas to death and that mass transit is the answer to the traffic problem. Doubtless, bus and rail rapid transit are essential components of a metropolitan transportation system, but it seems of doubtful validity to conclude they are the sole solution to the current problem. For one reason, the lifeblood of mass transit is a high density of population along transit routes.¹²

Power-Plant and Transport Tool of a Free People, SYMPOSIUM—CENTENNIAL OF ENGINEERING 1852-1952, at 443-44 (1952).

⁹ Hawley, *supra* note 1, at 10. He points out field surveys showing that generally the moving population is in the child-rearing stage of the family life cycle and child-related concerns are most often given as the reason for the exodus from the central core.

¹⁰ RECK, *supra* note 8, at 8.

¹¹ *Id.* at 25-26.

¹² Mylroie, *supra* note 8, at 75; RECK, *supra* note 8, at 22; REINSBERG, GROWTH AND CHANGE IN METROPOLITAN AREAS AND THEIR RELATION TO METROPOLITAN TRANSPORTATION 21 (1961); Rouse, *Transportation and the Future of Our Cities*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 2-5 (1962).

Population density in metropolitan areas outside the central core is relatively low because the automobile has made it possible to disperse over a greater area. As expressways are developed, the "60-minute radius" is extended still further. Another reason to doubt mass transit as a panacea is that the work movements that occur during only 2 or 3 hours of a day cause the congestion but are just one part of the total vehicle movements in a metropolitan area. In fact, no more than two of ten metropolitan motor vehicle trips are to the central core of the city.¹³ For this reason, outside peak hours, the demand for mass travel is relatively low. Furthermore, business has encouraged the use of motor vehicles through shopping centers and relocation of industry in the suburbs. Local governments lend further encouragement by planning libraries, schools, and other public service facilities on the basis of their accessibility to highways.¹⁴ What has happened is that the number of frequently visited household trip destinations has increased and they are scattered throughout the metropolitan area. To get there requires extensive travel routes.¹⁵ And, of course, state governments continue to build and improve highways in these areas.

With increases in leisure time, further dispersion of trip destinations may be expected. In short, the places where people need to go and where they want to go are becoming more widely scattered. The choice is not so much whether to go at all as which mode to select to get there. The ever-ready family car provides an obvious solution. And we have not yet mentioned commercial deliveries to these scattered destinations to provide the goods and services people seek, a task that transit cannot perform.¹⁶ Is it reasonable to expect mass transit to serve as the primary mode of mobility in such a social setting?

Studies by The Transportation Center of Northwestern University indicate that the comfort, convenience, and flexibility of the automobile are so well established in the minds of the public that a price reduction greater in amount than current public transportation fares would be required to divert one-third of the commuters from their cars.¹⁷ The Harris Survey has reported that most commuters would continue to use

¹³ Banner, *Balanced Transportation Service Downtown*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 6-4 (1962); SMITH & ASSOCIATES, *FUTURE HIGHWAYS AND URBAN GROWTH* iii (1961).

¹⁴ SMITH AND ASSOCIATES, *THE IMPACT OF HIGHWAYS ON SELECTED PUBLIC SERVICES* (1960).

¹⁵ Cowdery, *Coordination of Urban Transportation and Land-Use Planning*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 5-1 (1962); Hawley, *Social Factors and the Pattern of Urban Growth*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION transcript at 12 (1962); Moskowitz, *Living and Travel Patterns in Automobile-Oriented Cities*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 3-4 (1962); REINSBERG, *supra* note 12, at 22.

¹⁶ Patterson, *Urban Trucking and Truck Terminal Requirements*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 12-4 (1962).

¹⁷ Moses, *Economics of Consumer Choice in Urban Transportation*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 86 (1958).

their cars although another mode of equivalent speed but less expensive were provided.¹⁸

Many students of the problem advocate a balanced transportation system in metropolitan areas. They recognize that neither motor vehicle nor mass transit is the one perfect solution to the traffic problem. So they stress that metropolitan automotive transportation should be viewed as a system consisting of different but necessary and related components that should be coordinated and planned as such. Expressways, land use traffic generation capacities, automobile parking facilities, and public transit are all parts of the system.¹⁹ Even so, the automotive system is only a subsystem within the larger framework, which includes all modes of transportation.

We hope future cities will be designed so as to eliminate the transportation problem. Perhaps the satellite town concept or the star of radials linked at intervals with beltways or some other plan will provide the solution, but the future cannot be lived in today's metropolitan areas. Anticipated future social conditions do not necessarily relate to today's social problems. Nor can today's social problems be solved by policy decisions relating solely to anticipated future social conditions, for the time lag between planning and execution will not permit. A blend of present and future social facts would seem to be essential to policy planning. It is equally apparent that rational transportation policy decisions cannot be based on social conditions that no longer exist except in the minds of wishful thinkers who dream of the "good old days."

ECONOMICS

Technology contributed greatly to the mass acceptance of the automobile through the economic effect of its manufacturing techniques of mass production and standardization of parts, accompanied by improved quality. The growth has been so great that, in 1963, 17 percent of the nation's retail business establishments were automotive, 15 percent of the entire retail trade work force was employed in automotive retail outlets, and automobile businesses accounted for 26 percent of the value of all retail sales.²⁰ At the turn of the century a need existed for a rapid, flexible, efficient, individual mode of movement, but at the outset the motor vehicle had a limited market because it was so expensive. In 1900

¹⁸ The Harris Survey, *Auto Riders Are Cool to Rapid Transit Plan*, The Washington Post, Oct. 12, 1965, § C2, col. 1-2. See also H. Ross, *Social Problems of the Auto*, SOCIETY OF C.P.C.U., 21 THE ANNALS 227 (1968).

¹⁹ Allen and McElyea, *supra* note 4, at 100; Banner, *Balanced Transportation Service Downtown*, SYMPOSIUM—DYNAMICS OF URBAN TRANSPORTATION 6-4 (1962); Mylroie, *supra* note 8, at 75, 77; Owen, *AUTOMOTIVE TRANSPORTATION—TRENDS AND PROBLEMS* 36-37 (1949); REINSBERG, *supra* note 12, at 21-22; Rouse, *supra* note 12, at 2-4, 2-5.

²⁰ AUTOMOBILE MANUFACTURERS ASSOCIATION, INC., *AUTOMOBILE FACTS AND FIGURES* 63 (1969); UNITED STATES BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT* 763 (1968).

motor vehicle prices averaged about \$3,000, yet two out of three Americans lived in rural areas and had an average annual cash income of less than \$500. By 1916 the average price of motor vehicles was down to about \$600. Ford's Model T sold for about \$850 f.o.b. Detroit when introduced, but by 1913 it sold for \$550, and by 1915 only \$365. The saying was "one day—one dollar, one year—one Ford."²¹ At these prices, with reliability of the machine established and with the economic growth of the country generally, the efficiency and convenience of the motor vehicle held strong appeal to the general public. No longer was it a rich man's plaything and a poor man's dream.²² Furthermore, sales of used cars made it possible for lower income groups to purchase them, too.

Under the social conditions of that era, the horse and buggy could still serve the needs of families who did not own motor vehicles. Motor vehicle purchase was a matter of choice among modes, especially for the city dwellers. Considering the extent to which our space-age, metropolitan society is auto-oriented, it is doubtful that the average household has any real choice. Simply stated, most people actually need cars! To the extent this is true, the purchase price and operating expense are simply included in the budget along with food, shelter, and clothing. In fact, it is said that the Bureau of Labor Statistics includes the motor vehicle with these as an economic necessity.²³ For most, the real choice is whether to buy a new or used vehicle, and installment selling practices present a number of possible alternatives within this framework.

SOCIOLEGAL POLICY

Since the landing of the Pilgrims, the American tradition has been one of liberty of the individual with as little governmental interference as possible. The Declaration of Independence reflects this philosophy, and the Bill of Rights defines it in more specific terms for the protection of the individual against unwarranted federal government encroachment. The 14th amendment protects the individual from improper state action. Therefore, "freedom" or "liberty" or "independence" of the individual is established by our great documents as social policy in this country.

Students of the motor vehicle phenomenon have often described its social impact in terms of individual freedom. It permitted individual escape from the organized restraint of the compact 19th-century city and later from the isolation of farm life by removing the limitations of time

²¹ FREEMAN, *THE MERRY OLD MOBILES* 86 (1949); KETTERING AND ORTH, *THE NEW NECESSITY* 10-11 (1932). See Mylroie, *supra* note 8, at 73; OWEN, *AUTOMOTIVE TRANSPORTATION—TRENDS AND PROBLEMS* 18-20 (1949).

²² *Id.*

²³ RECK, *supra* note 8, at 23. Such a statement is misleading, however, for the Bureau of Labor Statistics includes both necessary and luxury items in its Consumer Price Index, without indicating which are considered necessary and which luxury. It is more accurate to state that the Bureau includes the motor vehicle with other items for which families actually spend their incomes. Television sets are also included.

and distance.²⁴ It permitted individual freedom of choice among social alternatives and added new ones. Through the effect of the choices people made, the individual mobility it permits has become not only highly prized but also essential.²⁵

The notion of freedom as a form of release or escape is applicable to the formative years of the motor vehicle as a transportation device. The city dweller could escape from his noisy, crowded, smoky environment—if only for a few hours. Similarly, the farmer could communicate with the city as a release from the isolation and boredom of farm life—again, if only for a few hours. However, no such freedom was possible without the essential facilities over which to operate the new mode. It is by the act of creating state highway departments and through the Federal-Aid Highway programs after World War I that organized governments legitimated the motor vehicle.

By these actions, governments chose the motor vehicle to replace the animal-powered vehicle. Perhaps it was not done deliberately, but the dependence of the vehicle on the available facilities had this effect. If society were to remain animal-powered, improved roads and state highway departments would not have been needed. Since those original decisions of government to support motor vehicle traffic by providing roads designed for them, there has been a succession of related decisions, each a reiteration of the same basic philosophy. The Highway Safety Act of 1966²⁶ is only another in the series.

Such government sanction of motor vehicle use released powerful forces that quickly resulted in a new type of freedom—the freedom of choice afforded by greater individual mobility. The motor vehicle was no longer simply a means of temporary escape. The newly built facilities permitted extension of the “60-minute radius” and linked farms to cities, consequently permitting permanent escape to the suburbs and urbanization of the farmers. Ultimately, the complementary actions of industry and government in providing vehicle and facility led to motor vehicle dominance of the transportation facet of our lives.

Ironically, this instrument of freedom of choice has produced another type of space-age bondage—namely, the traffic problem with all its ramifications. For this we should blame the people and not the cars. The Transportation Center of Northwestern University puts it this way: “The automobile has indeed undermined the transit industry, but we mistake the effect for the cause when we make villains out of cars and thoroughfares. These are the choices the people in metropolitan areas have made.”²⁷

²⁴ BORTH, *supra* note 8, at 442-45; Chapin, *The Motor's Part in Transportation*, CXVI ANNALS 1-5 (1924); KETTERING AND ORTH, *supra* note 8, at 21-22; McKee, *The Automobile and American Agriculture*, CXVI ANNALS 13-17 (1924); RECK, *supra* note 8, at 8-10.

²⁵ Hawley, *supra* note 1, transcript at 9; Mylroie, *supra* note 8, at 72; REINSBERG, *supra* note 12, at 7. See Banner, *supra* note 13, at 6-6; Chapin, *supra* note 24, at 5.

²⁶ 23 U.S.C.A. §§ 401-404 (1966).

²⁷ REINSBERG, *supra* note 12, at 8-9.

On several occasions the U.S. Supreme Court has recognized individual mobility to be a constitutionally protected interest.²⁸ These cases are mentioned here only to point out that, in contemporary American society, constitutionally protected individual mobility is most often expressed by operation of a motor vehicle. The implication is obvious.

It must be emphasized that constitutional protection is accorded mobility and not the mode of its expression. It is not to be expected that the Court will decide that motor vehicle operation is a constitutional "liberty" or "right" of the individual. The constitutional protection lies in mobility and not its method. However, because the purpose of the motor vehicle is mobility, a Court decision that driving a car is the primary means by which mobility is expressed would have the same effect. The data collected leave no doubt that the motor vehicle is, in fact, the overwhelming choice of the PEOPLE.

The significance of such a Supreme Court decision would be to require state governments to adopt driver control statutes and administrative procedures that meet federal standards of due process of law and equal protection of the laws.²⁹ Historically, state legislatures, agencies, and courts have not so viewed motor vehicle operation. Many have rejected the contention that it is either a state or federal constitutional "right" or "liberty."³⁰ Consequently, little attention has been given constitutional principles that would require state licensing agencies to observe standards of substantive and procedural fairness in the performance of their functions.

In their driver selection systems, which are based on statutes espousing attitudes and concepts developed in the pre-automotive era, many states continue to apply the social policies of a bygone age in a different social context. Accordingly, the resulting imbalance in the POWER-POLICY-PEOPLE struggle involving the motor vehicle contributes to increased social tensions. Law must somehow assist in the adjustment of these tensions if it is to meet its historical responsibility.

²⁸ *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Bell v. Maryland*, 378 U.S. 266 (1964); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Kent v. Dulles*, 357 U.S. 116 (1958); *Edwards v. California*, 314 U.S. 160 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *United States v. Wheeler*, 254 U.S. 281 (1920); *Williams v. Fears*, 179 U.S. 270 (1900); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

²⁹ This presumes the Court would hold individual mobility to be a "liberty" within the meaning of the fifth and 14th amendments, although there are other possible bases. Alternative constitutional bases are discussed in J. REESE, *THE LEGAL NATURE OF A DRIVER'S LICENSE* 3-11 (1965).

³⁰ The Feb. 1957 issue of *TRAFFIC DIGEST AND REVIEW* contains an exhaustive list of state court cases purportedly holding that driving is a privilege granted by the state, subject to reasonable conditions.

LEGAL RECOGNITION AND PROTECTION OF VALUABLE 16 SOCIAL INTERESTS

LEGAL RECOGNITION

It is obvious from the previous chapter that the motor vehicle is, indeed, a valuable tool by which the vast majority of American society expresses a valuable social interest. However, it does not necessarily follow that a valuable social interest will also be given legal recognition and protection. Has motor vehicle operation been so recognized?

State Case Law

Some courts have forthrightly stated their recognition of the fact that such a valuable social interest should be given legal protection. That these courts do not view the law as a closed, self-validating system is evident from the language with which they expressed themselves.

In the case of *Wignall v. Fletcher*,¹ the New York Court of Appeals considered administrative revocation of a driver's license and stated: "A license to operate an automobile is of tremendous value to the individual and may not be taken away except by due process."²

In a 1954 opinion upholding the New York implied consent statute the court stated: "[I]t is now the fact that the motor vehicle is clearly a necessity to our modern way of life."³

And finally, in the case of *Bechler v. Parsekian*, the New Jersey Supreme Court described the relationship between law and society as

¹ 303 N.Y. 435, 103 N.E. 2d 728 (1952).

² *Id.* at 441, 103 N.E. 2d at 731.

³ *Shutt v. MacDuff*, 205 Misc. 43, 53, 127 N.Y.S. 2d 116, 127 (Sup. Ct. 1954).

follows: "In the Wignall case, Judge Froessel pointed to the modern trend, which we hold to be a wholesome one; it recognizes that in today's society a license to operate an automobile may be of vital significance and value to the licensee. . . ." ⁴

Such statements from the bench indicating recognition of the legitimate relationship between law and society in the context of driver licensing are rare. Most courts leave unarticulated this critical bridging thought and merely state the conclusion in legal terms. That is to say, many state courts, following the modern trend described in *Bechler*, have chosen to vocalize the relationship by the use of legal labels and have stated simply that driving a vehicle is a "right" or a "liberty" within the meaning of state and federal constitutions. Such cases have been collected elsewhere.⁵

State Statutes

State motor vehicle statutes that establish formal mechanisms by which the license may be retained although the formal predictor policies indicate it should be withdrawn are another means by which states give legal recognition to the valuable social interest in operating a motor vehicle. The hardship licensing concept and processes were described and evaluated in Part II, Chapter 13, *supra*. That discussion need not be repeated here. California,⁶ Florida,⁷ Illinois,⁸ and Indiana⁹ have formalized the hardship licensing process. Despite state court language to the contrary, legislative provisions by which licensees may retain their licenses where they would otherwise lose them constitute formal legal recognition of the valuable social interest involved in driving.

Federal Cases

Social mobility has been recognized by the U.S. Supreme Court as a constitutionally protected liberty of mobility or "right to travel" on many occasions.¹⁰ The history of the development of the Court's recog-

⁴ *Bechler v. Parsekian*, 36 N.J. 242, 176 A.2d 470, 479 (1961).

⁵ See generally J. REESE, *THE LEGAL NATURE OF A DRIVER'S LICENSE* 35-52 (1965), for a full discussion of such cases. See also H. ROSS, *Social Problems of the Auto, Society of C.P.C.U.*, 21 *THE ANNALS* 227 (1968).

⁶ CAL. VEHICLE CODE §§ 14110, 14250, 14320 (West 1960).

⁷ FLA. STAT. ANN. §§ 322.271(2), 322.28 (1965).

⁸ ILL. ANN. STAT. ch. 95½, § 6A-205, 206(c) (Smith-Hurd 1958).

⁹ IND. ANN. STAT. § 47-2721 (Burns 1961).

¹⁰ *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *United States v. Guest*, 383 U.S. 745 (1966); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Kent v. Dulles*, 357 U.S. 116 (1958); *Edwards v. California*, 314 U.S. 160 (1941); *Hague v. CIO*, 307 U.S. 496 (1939); *United States v. Wheeler*, 254 U.S. 281 (1920); *Williams v. Fears*, 179 U.S. 270 (1900); *Slaughter-House Cases*, 83 U.S. 394 (16 Wall.) 36 (1872); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868).

nition of mobility as constitutionally protected is discussed in detail elsewhere.¹¹

In *United States v. Guest*,¹² the Court described liberty of mobility as follows:

The Constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [T]hat right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. (cases cited). . . .

Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed that the right exists. . . .¹³

In a footnote the Court indicated the right to travel to be so basic that it "is a right secured against interference from any source whatever, whether governmental or private."¹⁴

In his opinion, Mr. Justice Harlan reviewed earlier Supreme Court cases involving the right to travel and reached conclusions consistent with the analysis in *The Legal Nature of a Driver's License*.¹⁵ He concluded that "past cases do indeed establish that there is a Constitutional 'right to travel' between States free from unreasonable governmental interference."¹⁶

Liberty of Mobility Expressed by Driving a Motor Vehicle

Although the U.S. Supreme Court has not spoken directly on the question, other courts have clearly identified the act of driving a motor vehicle as a means by which the constitutional right to travel is expressed. State cases so concluding are numerous and have already been referred to. Federal recognition has likewise occurred, and two cases illustrating the fact should be discussed briefly. In *Wall v. King*¹⁷ a license had been withdrawn by state officials on the ground that the licensee had been reported to be operating a motor vehicle after drinking intoxicating liquor. Ultimately the state courts returned the license to the individual.

¹¹ DRIVER'S LICENSE, *supra* note 5, at 3-11.

¹² 383 U.S. 745 (1966). *Accord*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹³ *Id.* at 757-59.

¹⁴ *Id.* at 759-60, n. 17.

¹⁵ *Id.* at 762-70.

¹⁶ *Id.* at 763.

¹⁷ 206 F.2d 878 (1st Cir. 1953).

However, he filed an action in federal court seeking damages in tort in the sum of \$10,000 on the ground that the withdrawal of his license had been accomplished under color of state law so as to deprive him of federal rights, privileges, or immunities under the U.S. Constitution.¹⁸ The Court stated as follows with respect to the legal status of the license: "We have no doubt that the freedom to make use of one's own property, here a motor vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a 'liberty' which under the Fourteenth Amendment cannot be denied or curtailed by a state without due process of law."¹⁹

Although motor vehicle operation was concluded to be a "liberty" within the meaning of the Constitution, the Court quite frankly recognized that no liberty is absolute. In this particular case the Court balanced the interest of the individual in maintaining his freedom to move about against the interests of society in protecting the public against improper driving behavior and concluded that there had been no improper invasion of constitutional liberty.

Nevertheless, what is significant about *Wall v. King* is the fact that the Court entertained the issue. It would appear that relief in federal courts may be available to persons who suffer unjustifiable withdrawal of licenses.²⁰

Once it is accepted that driving a motor vehicle is a means by which constitutional liberty of mobility is expressed, it is readily apparent that the driver's license is similarly related. All 10 states in the study group, and in fact all states, require driver's licenses of persons who operate motor vehicles. Therefore, the license is a formal prerequisite to enjoying the constitutional right to travel, and it should not be denied or withdrawn for reasons not related to the purposes for which driver licensing systems are established. That is to say, if there is no rational relationship between the predictor policy used as a basis on which a license is denied and the licensing goal of preventing driver failure, the denial is unconstitutional. An example of improper withdrawal of the license on grounds that do not relate to the ability to operate a motor vehicle appears in *James v. Director of Motor Vehicles*.²¹ In this case, the Director of Motor Vehicles of the District of Columbia revoked a driver's license on the ground that the licensee was morally unfit to operate a motor vehicle. The basis of the action was that the licensee had been convicted of such offenses as housebreaking, larceny, and destroying

¹⁸ 8 U.S.C.A. § 43 (1953).

¹⁹ 206 F.2d 878, 882 (1st Cir. 1953).

²⁰ Cf. *Hornsby v. Allen*, 326 F.2d 605 (1964), *rehearing denied* 330 F.2d 55 (1964). This case likewise sustained jurisdiction in the U.S. Court of Appeals for the Fifth Circuit where a woman had been denied a liquor license by a local liquor licensing board. The court held that there was jurisdiction in the federal courts where, similarly, a federal right, privilege, or immunity had been potentially denied under color of state law.

²¹ 336 F.2d 745 (D.C. Cir. 1964).

movable property. In all of those cases the criminal penalties had been imposed on him. The Director believed this criminal record authorized revocation of the license. However, the Court of Appeals for the District of Columbia reversed his action on grounds of lack of relevance. The court stated:

[W]e think the Regulation relied upon does not vest the Director with the revocation power for misconduct unrelated to the ability of an individual to operate a motor vehicle so as "not to jeopardize the safety of persons or property." These modifying words indicate that the moral disqualification must be related to the ability or judgment needed safely to operate a motor vehicle.²²

This decision illustrates the duty of courts to ascertain the precise grounds on which license denial or withdrawal actions are based in order that their rational relevance to the goal of preventing driver failure may be assessed. It also illustrates that such a substantive attack may be made on agency rules and regulations as well as the statutes that driver licensing agencies implement through rules and regulations.²³

Further discussion of the relationship described above and additional cases appear in Chapter 6 of *The Legal Nature of a Driver's License*.²⁴

LEGAL PROTECTION

Methods Traditional to Driver Licensing

Driver licensing statutes themselves provide some protection to the individual interest in driving since the types of predictor policies established and the fact that there are few of them have the effect of ensuring that most people who apply will receive licenses. Similarly, there are relatively few statutory grounds requiring withdrawal of licenses. Obviously, the thrust of such policies is to assure that most persons will be allowed to obtain and retain licenses throughout their adult lives.

Provided it applies to driver licensing agencies, the administrative procedure legislation of a state constitutes another means of legal protection. Such legislation is primarily procedural in that it describes the mechanical processes by which agencies must administer the statutes they implement. Unfortunately, many lawyers and motor vehicle administrators appear to be ignorant of these controls. Very few of the driver licensing cases analyzed alluded to the administrative procedure legislation of the state involved.

Of course the existence of administrative procedure legislation does not mean that agencies are subject to its terms. The licensing agency of

²² *Id.* at 746.

²³ See DRIVER'S LICENSE, *supra* note 5, at 49, for a listing of right-liberty cases.

²⁴ *Id.* at 35-52.

California is included in the list of agencies subject to the California Government Code.²⁵ Florida's administrative procedure legislation defines "agency" in general terms and does not contain a list of agencies to which it applies. The breadth of the definition appears to subject the Florida driver licensing agency to its terms.²⁶ In Indiana and Michigan the administrative procedure statutes describe agencies subject to their terms by defining coverage broadly. However, coverage is limited by specific exceptions. Neither state excepts the organization that administers driver licensing.²⁷ Ohio specifically subjects "licensing functions" to its administrative procedure statutes.²⁸ New Jersey and New York do not have statutory definitions of the word "agency." In these states court decisions interpreting their constitutions and other statutes indicate that driver licensing authorities are agencies subject to the state administrative procedure legislation. However, New Jersey has no statutory administrative procedure act, and New York has few statutory provisions of this sort. Primarily, the constitutions and statutes of New Jersey and New York require agency rules and regulations to be filed centrally for public inspection.

Most administrative procedure legislation contains requirements as to the process by which agency rules or regulations are to be formalized and made public. In view of the fact that most driver licensing agencies have rule-making authority, their rules and regulations should be promulgated in accordance with appropriate statutory provisions.²⁹ Unfortunately, most licensing agencies do not make full use of their rule-making authority to promulgate formal statements of decision criteria as rules and regulations that are made public by filing in accordance with statutory or constitutional requirements.³⁰

The opportunity for an administrative hearing either preceding or following license withdrawal action is another means by which legal protection is afforded drivers. Hearings are primarily considered procedural in nature, yet they exist to protect substantive rights. No attempt will be made here to describe the nuances of hearing requirements in general or those of the study group states.³¹ One point that should be

²⁵ CAL. GOV'T CODE §§ 11500(a), 11501 (West 1966).

²⁶ FLA. STAT. ANN. § 120.021(1) (1965).

²⁷ IND. ANN. STAT. § 6A-1503 (Burns 1966); MICH. STAT. ANN. § 3.560 (7)(1) (1967).

²⁸ OHIO REV. CODE ANN. § 119.01(A) (Page 1965).

²⁹ CAL. VEHICLE CODE § 1651 (West 1960); FLA. STAT. ANN. § 322.02, 322.27 (2)(i) (1965); ILL. ANN. STAT. ch. 95½, §§ 6A-109(a), 6A-211 (Smith-Hurd 1958); IND. ANN. STAT. § 47-2405, 47-2708, 27-2910 (Burns 1966); MICH. STAT. ANN. § 9.1904(b) (1967); N.J. STAT. ANN. §§ 39:3-10.1, 39:3-11.3, 39:3-15.1 (1961); N.Y. VEH. & TRAF. §§ 207(3), 215 (McKinney 1960); OHIO REV. CODE ANN. §§ 4501.02, 4507.01, 4507.05, 4507.09, 4507.11, 4507.21, 4507.25 (Page 1965).

³⁰ A compilation and comparison of the filing requirements for administrative rules and regulations for the 50 states may be found in Cohen, *Publication of State Administrative Regulation—Reform in Slow Motion*, 14 BUFF. L. REV. 410 (1965).

³¹ See generally Johnston, *The Administrative Hearing for the Suspension of a Driver's License*, 30 NO. CAR. L. REV. 29 (1951).

noted carefully, however, is the fact that, where a compelling public necessity is shown, U.S. Supreme Court opinions permit agencies to take summary action (suspend licenses) and provide opportunity for a later hearing.³² Many state courts similarly provide for summary action to be followed by a later hearing.³³

A failure of the hearing process to provide adequate legal protection of valuable interests arises, not from the hearing itself, but from the lack of criteria to which reference may be made during the hearing. For example, if a licensing examiner adopts a passive attitude and asks a licensee (represented by his attorney) "What do you have to say in your behalf?" there is no response that can be made unless the decision criteria have been made known. If decision criteria are not articulated to the licensee, the purpose of the hearing is frustrated, for it will never consider the substantive criteria of decision.

Another legal protection afforded licensees is court review of agency decisions. However, the *Uniform Vehicle Code* attempts to exclude court review of *mandatory* license withdrawal actions.³⁴ Aside from attempts to foreclose court review, the privilege doctrine has historically been applied in driver licensing cases and has led courts to review agency action in a rather perfunctory fashion. In its classic expression, the privilege doctrine stands for the proposition that the interest asserted is not within the meaning of the due process clause of either federal or state constitutions. Therefore, it is said to follow that whatever substantive or procedural action is taken must, of necessity, be fair.

If licensing is conceived to be nothing more than a "mere privilege" it is not surprising that courts have tended to minimize substantive predictor policy review of driver license decisions. It is submitted that combining the privilege doctrine with "highway safety" as the goal to which licensing policy must relate makes it virtually impossible for a licensee to show improper substantive or procedural action by an agency. Fortunately, courts are moving away from the privilege doctrine, and it is to be hoped that in the future court review will begin to come to grips with the important constitutional questions arising in such cases. Furthermore, if court review is to be effective, courts must also recognize the error of using "highway safety" as the point of public-purpose reference to which licensing predictor policies must relate. Of course, "highway safety" is the ultimate goal of all highway safety policies. However, driver licensing programs are subsystems within the total systems approach to highway safety problems. The appropriate public-purpose reference is "prevention of driver failure leading to accident involvement."³⁵ Lack of such relevance resulted in reversal of the cited license

³² *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North American Coal Storage Co. v. City of Chicago*, 211 U.S. 306 (1908). See *Yakus v. United States*, 321 U.S. 414, 442 (1944) for a list of other cases justifying summary action.

³³ *E.g.*, *Thornhill v. Kirkman*, 62 So. 2d 740, 742 (Fla. 1953).

³⁴ UVC § 6-212 (1968).

³⁵ *E.g.*, *Jones v. Director of Mtr. Vehicles*, 336 F.2d 745 (D.C. Cir. 1964).

withdrawal decision in the District of Columbia because it was based on criminal convictions such as larceny and housebreaking.³⁶

An emerging type of legal protection afforded driver licensees is federal court review of state driver licensing actions. The case of *Wall v. King*³⁷ is indicative of the fact that federal courts may evaluate license decisions on the ground that they may involve restraints on federal rights, privileges, or immunities under color of state law.

Another possibility for court review that could serve as a mechanism for the protection of individual interests in driver licenses is federal court review of the National Highway Traffic Safety Administration standards. Initially, such review would probably be sought by a state that had been denied funds for failure to comply with the standards. For example, in states where implied consent statutes are held unconstitutional under state law, would withdrawal of funds for failure to comply with such a federal standard be permitted?³⁸ It has been held that states have a legal right to receive federal highway funds under the various congressional enactments that establish such programs.³⁹ However, in these cases judicial review provisions were included in the statutes. Nonetheless, in the case of *Stark v. Wickard*,⁴⁰ the Supreme Court indicated that although no statutory review procedure is provided "it is not to be lightly assumed that the silence of the statute bars from the courts any otherwise justiciable issue."⁴¹

Although the National Highway Traffic Safety Administration standards are directed at the states and not at individuals, recent developments in the law of standing in the federal courts may serve to allow individual actions to challenge components of the NHTSA driver licensing standard. In *Scenic Hudson Preservation Conference v. Federal Power Commission*⁴² a conservationist group sought to challenge the granting of a license to construct a hydroelectric project on the Hudson River. The court found the group had standing to sue under a statutory provision granting review to "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding. . . ." ⁴³ The plaintiffs were said to meet the controversy requirement as follows: "Although a 'case' or 'controversy' which is otherwise lacking

³⁶ *Id.*

³⁷ 206 F.2d 878 (1st Cir. 1953). See also *Hornsby v. Allen*, 326 F.2d 605 (1965), rehearing denied 330 F.2d 55 (1964).

³⁸ Little, *A Case for Eliminating Penalty From Federal Highway Safety Aid Provisions*, in ABA ADMIN. L. SEC., 21 ADMIN. L. REV. 425, 429 (1969).

³⁹ *Oklahoma v. United States Civil Ser. Comm.*, 330 U.S. 127 (1947).

⁴⁰ 321 U.S. 288 (1944). Accord, *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

⁴¹ *Id.* at 309. See also D. Skoller, R. Lynch, and M. Axilbund, *Legal and Quasi-Legal Considerations in New Federal Aid Programs*, 56 GEO. L. J. 114 (1968).

⁴² 354 F.2d 608 (2d Cir. 1965).

⁴³ *Id.* at 615. The statutory provision is § 313(b) of the Federal Power Act, 16 U.S.C. § 825(1)(b) (1964).

cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a 'case' or 'controversy'." ⁴⁴

In *United Church of Christ v. Federal Communications Commission*,⁴⁵ a challenge was raised to renewal of a broadcasting station license by a segment of the listening public. The court granted standing to the plaintiffs as "persons aggrieved or whose interests are adversely affected." ⁴⁶ On the standing issue the court stated: "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." ⁴⁷

On the basis of cases such as these it is possible that individual citizens might be allowed to bring actions attacking NHTSA standards. However, this will remain to be seen.

An Additional Legal Protection: The Right to Know

In addition to the traditional forms of legal protections discussed above, what is also needed is mass information as to how driver licensing agencies are exercising their power. The formal legal protections provided may be more illusory than real, for most people who are subjected to license denial or withdrawal decisions do not resort to them to vindicate their interests. Furthermore, not all members of the regulated group have effective access to the formal legal processes. That is, minority groups and persons of limited financial means may be aware of formal legal mechanisms but be afraid or unable to utilize them. In addition, the driving public is an inarticulate amorphous group that has not had an effective voice advocating its interests to policy makers. Lacking this opportunity, however, some other means must be found by which to provide some modicum of protection for the interests of such unheard citizens.

One means by which this might be accomplished is through agency promulgation of detailed rules and regulations regarding the licensing decision criteria and administrative procedures. The rule-making process could thus be used to bring government to the people. At least three reasons justify insistence on rule promulgation by driver licensing agencies: (a) rules operate prospectively rather than retroactively; (b) because driver licensing agencies make such large numbers of licensing decisions, it is not feasible to publish decisions and make them available to the public; and (c) it is well known that driver licensing agencies control masses of people and must find some means by which to stan-

⁴⁴ *Id.*

⁴⁵ 359 F.2d 994 (D.C. Cir. 1966). *Cert. den.*, 384 U.S. 941 (1966).

⁴⁶ *Id.* at 1001. This is taken from The Communications Act of 1934, § 402(b)(2).

⁴⁷ *Id.* at 1002.

dardize their decision criteria and processes in view of their limited staff.

Thus licensing agencies prepare staff manuals, guidelines, and bulletins that serve as the basis of decision in the large majority of cases that come before the agency. There may be exceptional cases not covered in the staff manuals, but 40 years of experience in regulating millions of licensees has permitted licensing officials to mechanize the decision process to a great degree. The question is simple: If an agency is capable of writing decision criteria and detailed procedural instructions in a manual for staff use, why have not these criteria and procedures been published formally as rules and regulations and filed as is usually required by statute? If the agency knows how it will proceed to determine given classes of driver license action cases, there is no reason for it to withhold that information from the driving public. James Madison once said, "(The) right of freely examining public character and measures, and our free communication thereof, is the only effective guardian of every other right."⁴⁸

The Supreme Court stated in *Grosjean v. American Press Co.*⁴⁹ that the first amendment to the Constitution must have come from the experience of the English in their long struggle to "establish and preserve the right . . . to full information in respect of the doings or misdoings of their government."⁵⁰

⁴⁸ Hennings, *The People's Right to Know*, 45 A.B.A.J. 667, 669 (1959), quoting from 6 WRITINGS OF JAMES MADISON 398 (Dunne ed. 1906).

⁴⁹ 297 U.S. 233 (1936).

⁵⁰ *Id.* at 247.

17 ADMINISTRATIVE RULES AND RULE MAKING

ADMINISTRATIVE POLICY-MAKING TECHNIQUE

Two techniques are used by agencies to announce the formal driver licensing policies that they have created. One is to make and apply policies in each driver licensing case that arises as a part of the process of deciding it. Ultimately, a group of policy expressions will have evolved that will guide the agency in its decision of similar issues in other cases. Another technique is to anticipate policy issues and commit the agency to a course of action in advance of the application of the policies in specific cases. As the policy expressions that have evolved through a series of cases become crystallized, they may be expressed formally as standards and criteria and may be captured in a statement describing the resultant policy product. The reduction of evolved policy to a statement presumes that the policy product is not so complex as to be incapable of being stated formally.

Retroactive Policy Making: The Case-by-Case Method

Driver licensing agencies commonly use the case-by-case technique. The advantages of case-by-case evolution of policy are that it provides flexibility, it permits treatment of matters not anticipated nor dealt with previously by the agency, and it allows treatment of matters extremely complex and incapable of being reduced to a formalized statement of policy. The major disadvantages of the case-by-case method are that it is retroactive in effect and it does not give the regulated public prior

knowledge of the standards and procedures that will be used by the agency in the exercise of its power. It offers no opportunity for advance evaluation and criticism of the policy intentions of the agency. Where agencies make policy on a case-by-case basis in driver licensing adjudication and where agency decisions are not published and made available to the public, the public is unable to know and understand the policies the agency is evolving. The driver licensing policy expressions of administrative agencies are subject to this criticism, for the agency licensing case decisions are not published. However, licensing agencies may also make policy prospectively by anticipating issues and promulgating policy expressions in the form of rules and regulations.

Prospective Policy Making: The Rule and Regulation Technique

Driver licensing rules and regulations express standards and criteria of judgment (substantive aspects) and the methods (procedural aspects) by which those criteria will be applied by the agency to the driving public. The primary advantage of this technique of making policy is that it is done prospectively. By being declared in advance of its application in an individual case, it is thus subject to criticism, evaluation, and even court attack before it becomes a part of the licensing program. For example, a person who wishes to complain about a particular standard or procedural rule may be able to attack its validity immediately upon its promulgation. There is no reason why the rule-making method of policy creation cannot be used efficiently by administrative agencies.

A possible disadvantage of announcing policy in rules and regulations is that the agency is committed and may feel that it has lost its "flexibility." It is indeed true that rules and regulations do confine the agency and serve as controls on the use to which the agency may put its transferred power. No harm is done the agency by this loss of flexibility, however, because *the agency* makes the policy. Naturally, it is easier for an agency to evolve its policies on a case-by-case basis as problems arise. It is a difficult task to create formal policy statements that anticipate all or even most of the questions and issues that might arise in a driver licensing program. However, the "loss of flexibility" complaint appears to be an unjustified criticism of the rule-making method. Since driver licensing agencies work at their task 12 months of the year, they have greater opportunity to make policy studies and reviews that may lead to the promulgation of formal rules and regulations. Furthermore, although it is committed to a particular rule or regulation that articulates a policy, nothing prevents the agency from changing the rule whenever it chooses. A driver licensing rule may be changed efficiently by complying with the appropriate administrative rule-making procedures contained in either its organic statute or the state administrative procedure legislation.

PUBLIC INFORMATION

If it has a right to know, the public needs to know what, if any, interpreting, clarifying, or implementing has been done by the administrative officials who administer the licensing statutes. In other words, it needs to know by what standards and criteria the state licensing department actually decides licensing cases.¹

General provision is made in constitutions² and statutes³ to require administrative agencies to disclose certain information relating to their processes. In theory this is accomplished through constructive notice of the rules and regulations the agency has adopted.⁴ Of course, it would also be desirable for licensing agency decisions to be reported to the public. But the fact is that they are not, and the sole source of information concerning the licensing process is the filed agency rules and regulations and public policy statements.⁵

In the field of driver licensing—the privilege theory notwithstanding—legislatures recognize the right of the driving public to be informed how they are being governed, for all the study states require the driver licensing authorities to file their rules and regulations with some central governmental office, usually the secretary of state.⁶

If the decision-making criteria are not made public, the effect is to create a situation in which applicants and licensees have no knowledge of the standards to which they are expected to conform to obtain and retain the driver's license. To expect public familiarity with the statutes

¹ For a discussion of the problem as generally presented by most state agencies, see I F. COOPER, *STATE ADMINISTRATIVE LAW* 161-72 (1965).

² N.J. CONST. art. 5, § 4 para. 6; N.Y. CONST. art. 4, § 8.

³ CAL. GOV'T CODE § 11380 (West 1966); FLA. STAT. ANN. § 120.041 (1969); ILL. ANN. STAT. ch. 127, §§ 265, 266 (Smith-Hurd 1967); IND. ANN. STAT. § 1505 (Burns 1967); MICH. STAT. ANN. § 3.560(10) (1967); N.Y. EXECUTIVE LAW §§ 102(1), 102(2); OHIO REV. CODE ANN. § 119.04 (Page 1965); PA. STAT. ANN. tit. 71, § 1710.21 (Purdon 1962) (this law was repealed July 31, 1968, and is superseded by PA. STAT. ANN. tit. 45, § 1101 *et seq.* (1969)); TEX. REV. CIV. STAT. ANN. art. 17 6252-13, § 4 (1962).

⁴ The statutes *supra* note 3 so require.

⁵ This lack of reporting bears directly on the importance of adoption and publicizing of meaningful rules by licensing authorities. Among agencies whose decisions are reported, an avenue of discovery of agency policies by the public is opened, regardless of rule adoption. Where there are no reported decisions, rules are vitally important for public information purposes.

⁶ CAL. GOV'T CODE §§ 11380, 11500(a), 11501 (West 1966); CAL. VEHICLE CODE § 1650 (West 1960); FLA. STAT. ANN. §§ 120.021(1), 120.041 (1965); ILL. ANN. STAT. ch. 95½, § 2-104(b), ch. 127, §§ 263, 265, 266 (Smith-Hurd 1958); IND. ANN. STAT. §§ 60-1503, 60-1505 (Burns 1966); MICH. STAT. ANN. §§ 3.560(7), 3.560(10) (1967); N.J. CONST. art. V, § 4, para. 6; N.Y. CONST. art. 4, § 8; N.Y. EXECUTIVE LAW §§ 102(1), 102(2); OHIO REV. CODE ANN. §§ 119.04 (Page 1965); PA. STAT. ANN. tit. 71, §§ 1710.2(b), 1710.21 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6252-13, §§ 4, 13(1)a (1965); Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFF. L. REV. 410 (1964-65).

to be sufficient is not realistic because the licensing authorities themselves find that statutes are not always a sufficient guide to decision.

Furthermore, without knowledge of agency criteria and standards, lawyers representing licensing clients cannot perform their functions properly. If decision factors are unknown, a court appeal may be virtually useless in states where judges sustain administrative decisions on the basis of substantial evidence in the administrative record reviewed.⁷ But the attorney is assisted in protecting his client's interests if criteria are known, for he may obtain judicial evaluation of the criteria or their application by the agency to the facts of his case. This allows meaningful judicial scrutiny and control of the licensing process.

In addition, rule making may offer the opportunity for public participation in the formulation of licensing policy. Some states require agencies to give the public an opportunity to participate.⁸

At this point the suggestion might be made to retain counsel familiar with the policies and practices of driver licensing agencies and thus sidestep the informational problem. This is often done where major state agencies are involved. However, is it possible with reference to driver licensing? Practice before licensing agencies is not particularly lucrative. So it is doubtful there are many attorneys who would qualify as specialists in practice before this particular agency. Hence, there is no organized group of driver licensing practitioners.⁹ In short, there is no group legal pressure brought to bear on driver licensing agencies.

⁷ It should be understood that the evidence in the record examined for its sufficiency to support the agency decision is one thing, but the decisional criteria and standards used by the agency to formulate its decision based on that evidence are another. The criteria are not evidence and most likely will not be part of the hearing record. Thus, if the criteria are unknown and are not in the record, there can be no judicial review of them. Theoretically, in states that review licensing decisions *de novo*, this problem is not presented, for the courts apply the statutes as they interpret them, without giving weight to the agency decision. However, many courts may not actually grant a full *de novo* review principally because they often construe *de novo* review requirements as unconstitutional attempts to impose executive and legislative duties on the judiciary.

⁸ States requiring public notice of proposed rule making are California: CAL. GOV'T CODE § 11423 (West 1966) (30 days); Indiana: IND. ANN. STAT. § 60-1504 (Burns 1966) (10 days); Michigan: MICH. STAT. ANN. § 3.560 (1967) (no specified minimum); Ohio: OHIO REV. CODE ANN. § 119.03 (Page 1965) (30 days); Texas: TEX. REV. CIV. STAT. ANN. art. 6252-13, § 2(c) (1965) (no specified minimum). States that require a formal public hearing for the adoption of rules include Indiana: IND. ANN. STAT. § 60-1504 (Burns 1966); Ohio: OHIO REV. CODE ANN. § 119.03(c) (Page 1965). States that require the agency to allow the public to present views on proposed rules without the necessity of a formal hearing include California: CAL. GOV'T CODE § 11425 (West 1966); Michigan: MICH. STAT. ANN. § 3.560(7a) (1967); Texas: TEX. REV. CIV. STAT. ANN. art. 6252-13, § 2(c) (1965).

⁹ Cohn, *Administrative Procedural Reform in Illinois*, 17 AD. L. REV. at 91 (1964): "It is in respect to the lesser state agencies and the myriad of local agencies, where administrative procedures are much more informal and imprecise, that one would expect a demand for reform. But even at this level one finds little professional interest. The answer may be that the practicing bar in these areas is much more diversified

In order that a licensee or license applicant may be adequately represented, legal practitioners must have available to them sufficient information for efficient and meaningful research.¹⁰ Otherwise, in many instances the citizen will be forced to incur prohibitive legal fees, or be poorly represented, or not be represented at all—even though the valuable interest in individual mobility is at stake. With no reported agency decisions to study and few, if any, public policy statements to evaluate, licensing agency rules and regulations are imperative if the public is to be kept informed.

RULES AND RULE MAKING

At the federal level administrative information is made available to the public by Section 3 of the Federal Administrative Procedure Act,¹¹ which *requires* federal agencies to publish in the Federal Register (a) rules describing the agency's organization and methods whereby the public may secure information or make submittals or requests; (b) statements of the general course and method by which its functions are channeled and determined, including available formal and informal procedures as well as forms and instructions; and (c) substantive rules as authorized by law and statements of general policy, or interpretations for guidance of the public. As might be expected, state statutes dealing with agency rules vary considerably from their federal counterpart on this point.

If the Revised Model State Administrative Procedure Act section on rule requirements¹² is taken as the norm, the study states fail to measure up to desirable rule-making requirements. Most of them simply define what is meant by rule or regulation and require its filing. Furthermore, with the exception of Florida, all study state statutes granting rule-making authority to licensing agencies are couched in permissive rather than mandatory terms.¹³ That is, most state statutes provide that driver licensing authorities *may* adopt rules and regulations to administer their statutes, but a Florida statute indicates the agency *shall* make rules.¹⁴

and diffused, and the character of its practice before these agencies sporadic and temporary and thus nonproductive of a continuing professional interest."

¹⁰ The information sought is meaningful policies and criteria and not a compendium of court cases constituting a rehash of criminal law principles and the right-privilege dichotomy.

¹¹ 60 Stat. 237 (1964), 5 U.S.C. 551-706.

¹² National Conference of Commissioners on Uniform State Laws, REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 2 (1970).

¹³ CAL. VEHICLE CODE § 1651 (West 1960); ILL. ANN. STAT. ch. 95½, §§ 2-104, 6-211a (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-1046, 47-2910, 47-2405 (Burns 1966); MICH. STAT. ANN. §§ 9.1904(b), 9.2201 (1967); N.Y. VEH. & TRAF. §§ 215, 330b (McKinney 1960); OHIO REV. CODE ANN. §§ 4507.01, 4507.05, 4509.03 (Page 1965); PA. STAT. ANN. tit. 75, § 1401 (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6701h, § (2) (1965).

¹⁴ FLA. STAT. ANN. § 322.02 (1965): "The executive board, through its director, shall make and adopt rules and regulations for the orderly administration of this chapter,"

The permissive language of these statutes may lead one to conclude that licensing authorities are not statutorily bound to adopt rules and file them. However, the impetus to adopting and filing rules is usually provided by an accompanying statute that defines rule or regulation broadly and requires its filing if it is to be effective.¹⁵ For example, in New York the constitution and Executive Law require rules and regulations to be filed if they are to be effective, but they do not define "rule" or "regulation."¹⁶ The State Traffic Commission issued what it termed an "order" fixing a speed limit of 35 miles per hour in a given zone. A driver convicted of speeding raised the question on appeal that this "order" was invalid because not promulgated as a rule. The Commission contended that since it was issued as an order and not as a rule there was no necessity of complying with the filing requirements. The New York Court of Appeals said, however, that it was in effect a rule:

The term "rule or regulation" has not, it is true, been the subject of precise definition, but there can be little doubt that, as employed in the constitutional provision, it embraces any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future. The label or name employed is not important and, unquestionably, many so-called "orders" come within the term.¹⁷

The court then concluded:

We know that underlying the provision was the desire to have all rules and regulations affecting the public filed in one easily available, central place. We should not strive to read exceptions into the section or construe it so as to permit the official in charge of the bureau, commission or authority to avoid the necessity of filing by attaching the label "order" or "statement of policy" or some other term to what is essentially a rule or regulation. The spirit and design of the constitutional provision are best

¹⁵ See the statutes listed in note 3 *supra* and accompanying text.

¹⁶ N.Y. CONST. art. 4, § 8:

No rule or regulation made by any state department, board, bureau, officer, authority or commission, except as such relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. . . .

N.Y. EXECUTIVE LAW §§ 102(1), 102(2):

(1) Each department . . . authorized by statute to adopt codes, rules or regulations shall transmit to the secretary of state a certified copy of every such code, rule and regulation . . . in force at the time of such transmittal or to become effective thereafter . . . together with a citation of the statutory authority pursuant to which each such code, rule or regulation was adopted. (2) Immediately upon adopting any new code, rule or regulation or any amendment to or repeal thereof . . . the original thereof shall be filed in the office of the department of state. . . .

¹⁷ *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.S.2d 38, 40, 176 N.E.2d 495, 497 (1961).

effectuated by requiring the administrator, if he wishes the rules and regulations of his agency or department to be effective, to file them no matter what label is assigned to them.¹⁸

The implication of the holding is that whatever falls within the meaning of rule or regulation must be properly promulgated and filed to be valid. Since New York statutes do not define what is meant by "rule" or "regulation," the courts must interpret the constitution and Executive Law in each case, by applying the test set forth in *People v. Cull* quoted here. The filed rules are now replete with speed regulations in effect throughout the state of New York.

Rule and regulation definitions vary from state to state. Pennsylvania is a state with an extremely broad definition. Its statute defines "rule" or "regulation" as follows:

"Regulation" means any rule, regulation or order in the nature of a rule or regulation, of general application and future effect, promulgated by an agency under statutory authority in the administration of any statute administered by or relating to the agency, or prescribing the practice or procedure before such agency.¹⁹

At the other extreme is the very limited Texas definition, which provides:

"Rule" is hereby defined to mean and shall include only rules and regulations promulgated or adopted by an agency governing or relating to rules of procedure or practice before such agency, or to govern its organization or procedure . . . provided that such definition shall not include or be applicable to rules . . . adopted . . . to properly perform its statutory duties or to implement or make specific the law enforced . . . or to rules . . . concerning the internal management of the agency. . . .²⁰

The effect of these two statutes is that in Pennsylvania many agency statements concerning licensing will constitute rules that must be filed to be effective, whereas in Texas rules required to be filed as a matter of public record are limited to the procedural rules of the agency. Thus, Texas excludes from its filing requirements the substantive predictor policies that are applied in the selection system.

With the exception of New Jersey and New York, the other study states have statutory definitions of "rule" that tend to the broader language and are thus more inclusive. The definition is critical, for it determines in large part what the public may expect or demand that the agency file publicly as rules or regulations.

¹⁸ *Id.* 218 N.Y.S.2d at 42, 176 N.E.2d at 498.

¹⁹ PA. STAT. ANN. tit. 71, § 1710.2(e) (Purdon 1960).

²⁰ TEX. REV. CIV. STAT. ANN. art 6252-13, § (1)b (1965).

Criteria of a good definition of "rule" suggested by Professor Cooper²¹ are, first, the concept should be described in broadly inclusive terms:

This has proved necessary to defeat the inclination shown by some agencies to label as "bulletins," "announcements," "guides," "interpretive bulletins," and the like, announcements which, in legal operation and effect, really amount to rules; and then to assert that their promulgations are not technically rules but merely policy statements, and hence may be issued without observance of the procedures required in connection with the adoption of rules.²²

Cooper goes on to recommend that the term should be confined to statements of a legislative nature and of general applicability; the term should include all statements that implement, interpret, or prescribe law or policy (this is to make certain the agency's position on statutory interpretations and policy are known); the definition should include all statements describing the procedure or practice requirements of the agency; it should include any statement that describes the organization of the agency; and it should include amendments or repeals of rules, inasmuch as they are just as important as new rules.

Cooper also suggests sharpening the definition by excluding statements involving only internal management of the agency and not affecting private rights or available procedures, declaratory rulings of the agency as to applicability of rules, and intra-agency memoranda not affecting private rights.²³

No state in the study group has a definition of "rule" that meets all the suggested criteria, although many of them include different combinations of the suggested provisions. For example, the California, Florida, and Michigan rule definitions include agency interpretations of statutes and policy;²⁴ Florida, Illinois, Michigan, and Texas include statements of the agency organization;²⁵ California, Florida, Illinois, Michigan,

²¹ F. COOPER, *supra* note 1, at 108-109. He states that the definition of rule in the REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(7) meets all these criteria. The Revised Act's definition is as follows:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

²² F. COOPER, *supra* note 1, at 108.

²³ *Id.* at 109.

²⁴ CAL. GOV'T CODE § 11371(b) (West 1966); FLA. STAT. ANN. § 120.021(2) (1965); MICH. STAT. ANN. §§ 3.560(7)1, 3.560(7)2 (1967).

²⁵ FLA. STAT. ANN. § 120.021(2) (1965); ILL. ANN. STAT. ch. 127, § 264 (Smith-Hurd 1958); MICH. STAT. ANN. §§ 3.560(7)1, 3.560(7)2 (1967); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(b) (1965).

and Texas include amendments and repeals of existing rules as well;²⁶ and California, Indiana, Michigan, Pennsylvania, and Texas include rules of practice and procedure.²⁷ On the other hand, California, Florida, Illinois, Indiana, Michigan, Ohio, and Texas exclude from the definition statements relating solely to internal management of the agency.²⁸

The state constitutional provision or statute defining rule or regulation must be analyzed to determine if the license authority applies decision criteria that are within the definition but are not filed. It is of major importance to determine whether licensing officials have avoided the rule promulgating and filing obligations by the use of such labels as "bulletin," "handbook," or "manual."

There could be a question, for instance, as to the validity of the administratively adopted point system used in the state of New York,²⁹ since it has not been adopted and filed as a rule of the Department of Motor Vehicles. Is a licensing decision based on its provisions subject to attack on the same basis as the speed regulation in *People v. Cull*?³⁰ discussed earlier? How may the public and attorneys apprise themselves of the content of this policy of general application unless it is filed as a rule in accordance with constitution and statute? Or is it outside the meaning of "rule"? It is a reasonable interpretation of the New York constitution and statutes, as expressed in *People v. Cull*, to expect that the point system must be publicly filed as a rule. Would the same result obtain in other states using administrative point systems not filed as rules?³¹ New Jersey formalized its point system in Departmental Regulation 13:4-124.2, duly filed with the secretary of state.

What seems to be lacking is driver license agency recognition of the fact that its various statements of policy, manuals, guidelines, etc., are driver licensing rules by statutory definition.

Rule making is that phase of licensing administration wherein the administrator legislates in order that he may effectively administer by

²⁶ CAL. GOV'T CODE § 11371(b) (West 1966); FLA. STAT. ANN. § 120.021(2) (1965); ILL. ANN. STAT. ch. 127, § 264 (Smith-Hurd 1958); MICH. STAT. ANN. §§ 3.560(7)1, 3.560(7)2 (1967); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(b) (1965).

²⁷ CAL. GOV'T CODE § 11371(b) (West 1966); IND. ANN. STAT. § 60-1503 (Burns 1966); MICH. STAT. ANN. §§ 3.560(7)1, 3.560(7)2 (1967); PA. STAT. ANN. tit. 71, § 1710.2(c) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(b) (1965).

²⁸ CAL. GOV'T CODE § 11371(b) (West 1966); FLA. STAT. ANN. § 120.021(2) (1965); ILL. ANN. STAT. ch. 127, § 264 (Smith-Hurd 1958); IND. ANN. STAT. § 60-1503 (Burns 1966); MICH. STAT. ANN. §§ 3.560(7)1, 3.560(7)2 (1967); OHIO REV. CODE ANN. § 119.01(C) (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(b) (1965).

²⁹ A. ANTONY, SUSPENSION AND REVOCATION OF DRIVER'S LICENSES 45 (1966); B. CAMPBELL, DRIVER IMPROVEMENT: THE POINT SYSTEM 113-16 (1958).

³⁰ 10 N.Y.2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495 (1961).

³¹ See ANTONY, *supra* note 29, at 45-49; see generally CAMPBELL, *supra* note 29. According to these studies, Illinois, Indiana, New Jersey, and New York use administratively adopted point systems for license suspension. Antony points out that in New Jersey the system was adopted and filed as an administrative rule. This has not been done in the other states that are said to use such systems.

creating "little laws," or decision criteria of general applicability to all licensees and potential licensees.³² Generally speaking, to the extent those "little laws" are properly adopted and are within the authority of the agency, they have the force of law in the same fashion as statutes enacted by the legislatures.³³ This is a primary reason why there are statutes that declare agency "laws" to be rules or regulations that must be made public.

AGENCIES SUBJECT TO RULE-MAKING STATUTES

There can be no doubt that the various structures of government used by states to administer driver licensing statutes are bona fide administrative agencies. The word "agency" is usually applied to all commissions, boards, and individual officials who administer statutes. But establishing connective links between the requirement of rules, rule making, and central filing is necessary to determine whether driver licensing agencies are subject to those statutes.

In California and Illinois there is no doubt the driver licensing agencies are subject to the rule-making requirements of the administrative procedure statutes, because the motor vehicle statutes specifically so state.³⁴

Some states define "agency" in general terms similar to the approach of the Revised Model State Act. The Florida, Pennsylvania, and Texas statutes are of this type,³⁵ and their breadth of language appears to bring driver licensing authorities within their terms, thereby subjecting them to the statutory rule definitions and rule-making requirements.

The Indiana and Michigan statutes describe agencies subject to their administrative procedure statutes in general terms but limit the coverage by making specific exceptions.³⁶ Neither state excepts the organization that administers driver licensing statutes.

By its statutory definition Ohio takes an approach similar to those of California and Illinois in specifically subjecting "licensing functions" to the administrative procedure statutes for rule-making purposes.³⁷ Actually, California specifies the agencies subject to its administrative

³² *United States v. Mersky*, 361 U.S. 431, 437 (1960).

³³ 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, at §§ 5.03, 5.05. This statement is not literally true because it does not account for the distinction between agency legislative rules and agency interpretive rules. The latter may not have the force of law. This will turn on a court's interpretation of the statute, which, of course, may or may not coincide with that of the agency. On this point see particularly 1 DAVIS, *supra* note 33, at § 5.05, and 1 COOPER *supra* note 1, at 174-178.

³⁴ CAL. VEHICLE CODE § 1650 (West 1960); ILL. ANN. STAT. ch. 95½, § 2-104(b) (Smith-Hurd 1958).

³⁵ FLA. STAT. ANN. § 120.021(1) (1965); PA. STAT. ANN. tit. 71, § 1710.2(b) (Purdon 1960); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 1(a) (1965).

³⁶ IND. ANN. STAT. § 60-1503 (Burns 1966); MICH. STAT. ANN. § 3.560(7)1 (1967).

³⁷ OHIO REV. CODE ANN. § 119.01(A) (Page 1965).

procedure act, and its Department of Motor Vehicles is included.³⁸ In addition, the motor vehicle statutes similarly provide, as has been stated.

New Jersey and New York have no statutory definition of "agency." In these states court decisions interpreting their constitutions and other statutes indicate driver licensing authorities are agencies whose rules are subject to the filing requirements.³⁹

From the foregoing discussion it is apparent that administration of driver licensing in all the study group states is conducted by agencies that are subject to the rule definitions and filing procedures set forth in the state administrative procedure statutes. The extent of the filing requirement will vary, of course, with the definition of what is considered to be a rule or regulation.

TYPES OF RULES

There are three types of agency rules that serve three basic purposes. It is not possible, nor is it necessary, to draw clear-cut distinctions between the three classifications.

Procedural rules comprise the first classification, and the term "refers to those describing the methods by which the agency will carry out its appointed functions—rules which make provisions for the filing of applications, the institution of complaints, the serving of papers, the conduct of hearings, and the like."⁴⁰

Such rules are most important to the individual licensee or license applicant involved in a dispute with the agency but, unfortunately, in most cases formal procedural rules for driver licensing agencies in the study states simply do not exist, even though it is obvious the agencies must have developed methods of procedure after years of administering their statutes.

A notable exception to the general pattern is the adoption and filing of procedural rules by the Bureau of Motor Vehicles of the State of Indiana governing formal driver license withdrawal hearings.⁴¹ In its 12 procedural rules, the Indiana Bureau has adopted provisions concerning, *inter alia*, notice, subpoenas, continuances, evidence, the hearing record, the hearing officer and his powers, findings of fact, hearing officer's determination, final order, and appeal for reconsideration or rehearing. Although subject to criticism in some respects, these Indiana rules nevertheless permit licensees and their attorneys to familiarize themselves with the details of formal hearing procedures in Indiana. They constitute prime examples of reasonably specific, clear rules that

³⁸ CAL. GOV'T CODE, §§ 11500(a), 11501 (West 1966).

³⁹ *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495 (1961); *Bechler v. Parsekian*, 36 N.J. 242, 176 A.2d 470 (1961).

⁴⁰ I COOPER, STATE ADMINISTRATIVE LAW 173 (1965).

⁴¹ INDIANA RULES & REGULATIONS (1947), 1960 ADDITIONS AND REVISIONS TO RULES AND REGULATIONS at 93-101.

are sufficiently informative. Nothing is said, however, of available informal procedures or procedures to be employed in a hearing following denial of a license upon original application. For this information, the license applicant or attorney must either inquire of the Bureau of Motor Vehicles or assume there are no informal procedures.

In California formal hearings are governed by detailed administrative hearing statutes that are applicable to the Motor Vehicle Department.⁴² But again, the informal procedures are left to the Department and should be set out in the form of rules.⁴³

Michigan has promulgated procedural rules for the conduct of hearings held by its License Appeal Board,⁴⁴ but they are not sufficiently comprehensive to cover all procedural issues, and compared with the Indiana rules could be said to be sketchy and incomplete. Nevertheless, the Michigan licensee has access to far more procedural information than most states provide. It has been suggested that there is a persistence on the part of state agencies to refuse to commit themselves to any fixed procedural pattern.⁴⁵ At issue is the working out of an appropriate compromise between the agency's interest in complete procedural flexibility and the individual interest in procedural regularity. In most of the states studied, this charge of refusal to commit can be justifiably leveled at the driver licensing authorities.

A second rule classification consists of interpretive rules, which are "those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretive rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. . . . They state the interpretation of ambiguous or doubtful statutory language which will be followed by the agency unless and until the statute is otherwise authoritatively interpreted by the courts."⁴⁶

For example, Florida Statute § 322.12 provides for an "eyesight" test of license applicants. This is interpreted by an agency rule, which describes the visual acuity requirement of the operator or chauffeur license applicant, except school bus drivers, to be 20/70 in both eyes or, if vision in one eye only, 20/40 in the good eye. Visual acuity of 20/200 is the equivalent of blindness in that eye. The school bus chauffeur must have 20/20 or 20/30 in one eye and 20/40 in the other.⁴⁷ Similarly, Florida Rule 295A-1.18 defines the phrase "moving violation"⁴⁸ as used

⁴² CAL. GOV'T CODE, §§ 11500-11528 (West 1966).

⁴³ See Pricer & Wickoff, *Practices and Procedures of the Department of Motor Vehicles*, 14 HASTINGS L. J. 355, 364 (1963) for a description of the informal hearing procedure used by the Department.

⁴⁴ MICH. AD. CODE §§ 11.51-.55 (Supp. 1956) (Procedure for Conducting Hearings Held by License Appeal Board).

⁴⁵ I F. COOPER, *STATE ADMINISTRATIVE LAW*, 174 (1965).

⁴⁶ *Id.* at 174-75.

⁴⁷ FLA. AD. CODE ch. 295A, § 1.13 (Rules of the Department of Public Safety).

⁴⁸ FLA. STAT. ANN. § 322.27(2)(d) (1965).

in the statutory point system for license suspension to mean any violation in Chapter 317⁴⁹ and §§ 320.40-43⁵⁰ and § 320.54⁵¹ of the Florida Statutes. In addition, the rule indicates how the point assessment is to be made if multiple violations result in a single conviction or multiple convictions.⁵²

Florida Rule 295A-1.15 provides a detailed explanation of the scoring of the driving ability demonstration required of its license applicants.⁵³ It first states grounds for immediate disqualification of the applicant⁵⁴ and then describes the scoring values to be assessed all parts of the driving demonstration. By examination of this rule the license applicant may know exactly what is to be expected of him and how his test will be scored. If a dispute arises as to the driving demonstration or its scoring, the examining officer is protected if he scored in accordance with the rule, and the test sheet may be compared with this rule to

⁴⁹ Chapter 317 is titled "Regulation of Traffic on Highways," and includes offenses such as disobedience of traffic signs or signals, failure to stop and render aid at the scene of an accident, driving while intoxicated, reckless driving, speeding, failure to observe the rules of the road, and improper or inadequate vehicle equipment.

⁵⁰ These sections establish maximum length, width, weight, and height of vehicles and equipment and prohibit rough-surfaced wheels and certain vehicles from using hard-surfaced roads.

⁵¹ This section establishes regulations requiring mirrors and obedience to detour signs, and it prohibits dragging of vehicle or load, hauling injurious substances, and obstructing highways.

⁵² The rule provides that where there are multiple violations but only one conviction, they shall be considered as one violation with points to be assessed "on the violation having the highest number of points." If there are multiple violations, and more than one conviction, each offense is considered separate and points are assessed accordingly. Convictions resulting in revocation of the license shall not be assessed points. In the event of a citation or conviction for "no driver's license," no points will be assessed if the department's records indicate the violator had a valid permit before the citation was issued.

⁵³ FLA. STAT. ANN. § 322.12 (1965) provides: "The department shall examine every applicant for a restricted operator's, operator's or chauffeur's license, except as otherwise provided. . . . It shall include . . . an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle."

⁵⁴ Grounds for immediate disqualification of the applicant are specified as having an accident; commission of an act considered dangerous—dodging, stalling vehicle in a busy intersection, etc.; traffic law violations; lack of cooperation or refusal to perform for the examiner, including refusal to attempt a maneuver or stating he cannot do it; offering bribes or gratuities; arguing about the scoring; or accusing the examiner of discrimination. The latter two provisions are subject to question. Why should the examiner be given the power to disqualify the applicant who questions the test score or accuses him of bias? Perhaps these provisions are designed to prevent unpleasant situations, but the sanction of disqualification of the applicant for questioning the judgment or attitude of the examiner seems unduly severe. The applicant may be correct in his assertion! The validity of such rules is to be doubted, for they stifle the right of the applicant and the public to question the licensing process. The applicant who believes he has been improperly treated should be given an opportunity to establish his contention at a hearing; immediate disqualification for merely raising the question is too severe.

determine whether there is merit in a claim that the officer scored incorrectly. It may also assist in evaluating a claim that the officer was biased. Or, if deemed appropriate, the rule itself may be attacked as being invalid or unreasonable. Such detailed rules are valuable. The public interest is protected by a public declaration of minimum standards of driving proficiency for licensing, and the individual interest is protected by knowledge of the decisional norm. The Florida statutes would not have afforded this protection to the individual, for they simply require a test of "eyesight,"⁵⁵ an "actual demonstration of ability"⁵⁶ to drive, and an assessment of points for a "moving violation."⁵⁷

Since it has become an accepted technique of statutory draftsmanship to set forth legislative policies and standards in broad terms, there can be no doubt that adequate interpretation of statutory standards and policies by agency rules is of vital importance to the individual who wants to obtain and retain a driver's license—assuming, that is, that the public is entitled to be kept informed as to how it is being governed.

The third category consists of legislative rules. Professor Davis states:

A legislative rule is the product of an exercise of legislative power by an administrative agency, pursuant to a grant of legislative power by the legislative body. In the clearest case of a legislative rule, a statute has conferred power upon the agency to issue the rule and the statute provides that the rule, if within the granted power, shall have the force of law.⁵⁸

There appears to be no clear-cut guide to the character of most agency rules in the field of driver licensing. The reason is that the courts and not the agencies characterize rules as part of their reviewing function. Without a court decision as to the legal nature of a particular rule, one of the borderline variety could be termed either legislative or interpretive.⁵⁹ In driver licensing there are few, if any, decisions that classify rules and regulations. The significance of this rule characterizing function of the courts is that it has a direct impact on the type and extent of review of the rule the court will provide. If the court views a licensing agency rule as legislative in nature, it will be considered binding on the court to the same extent as a statute provided it is within the scope of the granted power, is issued in accord with the required rule-making procedures, and is constitutional (reasonable).⁶⁰ Therefore, the

⁵⁵ FLA. STAT. ANN. § 322.12 (1965).

⁵⁶ FLA. STAT. ANN. § 322.12 (1965).

⁵⁷ FLA. STAT. ANN. § 322.27(2)d (1965).

⁵⁸ DAVIS, *supra* note 33, at 299. See also BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 294 (1942).

⁵⁹ Professor Davis is of the belief, for example, that agency procedural rules are usually legislative, with or without specific power to adopt them. See DAVIS, *supra* note 33, § 503.

⁶⁰ *Id.* It has been suggested that state courts may not make the distinction between interpretive and legislative rules, but simply classify rules as either procedural or

court's review is limited to determining the validity of the rule, and it does not substitute its policy judgment for that of the agency.

On the other hand, if the court considers a rule to be interpretive, it has the power to substitute its judgment as to the propriety of the rule, for the law is embodied in the statute, not the rule, and the court is thus free to interpret the statute as it believes proper. Accordingly, the scope of review is broader. Unfortunately this important distinction is not often discussed in state court opinions, although some courts apparently recognize it and give it effect.⁶¹

Whether the door is open to meaningful judicial scrutiny of the licensing process depends on the court's characterization of licensing rules—provided there are, in fact, rules available for the courts to construe. Questions of the authority of agencies to adopt procedural and interpretive rules rarely arise. The very nature of the administrative process would seem to imply this power. In any case, most of the study states make provision for necessary rule making by driver licensing officials.⁶²

Herein lies the real tragedy of licensing administration: Meaningful, comprehensive rules, with a few scattered exceptions, do not exist!

Reviewing courts are in the awkward position of having to hold the informal agency policies and decision criteria invalid because they have not been filed as rules. This they are loathe to do for fear of returning a potentially dangerous driver to the highways. Yet, without such decisions, how shall effect be given to statutes designed to protect the rights of PEOPLE to have a fair opportunity to know what is expected of them and know how they will be judged by the agency?

How can people secure a meaningful court evaluation of evasive, unarticulated licensing decision criteria? Effective judicial review may, therefore, be rendered impossible in the ordinary case. The record compiled at the adjudicatory hearing before the agency will consist of the driving record file of the individual, statements, reports, and other evidence. There is no assurance the unfilled manuals, policies, handbooks,

substantive in nature. On this point see Fuquay, *Administrative Rule Making and Adjudication in Florida*, 9 U. FLA. L. REV. 260, 264-65 (1956).

⁶¹ E.g., *Comptroller of Treasury v. M. E. Rockhill, Inc.*, 205 Md. 226, 234, 107 A.2d 93, 98 (1954):

There are several different classes of administrative rules. Some are legislative rules, which receive statutory force upon going into effect. Others are interpretative rules, which only interpret the statute to guide that administrative agency in the performance of its duties until directed otherwise by decision of the courts.

⁶² CAL. VEHICLE CODE § 1651 (West 1960); FLA. STAT. ANN. § 322.02 (1965); ILL. ANN. STAT. ch. 95½, §§ 2-104 6-211a, 7-101 (Smith-Hurd 1958); IND. ANN. STAT. §§ 47-1046, 47-2405, 47-2910 (Burns 1966); MICH. STAT. ANN. §§ 9.1904(b), 9.2201 (1967); N.Y. VEH. & TRAF. §§ 207(3), 215, 330(b) (McKinney 1960); OHIO REV. CODE ANN. §§ 4501.02, 4507.01, 4507.05, 4509.03 (Page 1965); PA. STAT. ANN. tit. 71, § 1401 (Purdon 1960) (financial responsibility); TEX. REV. CIV. STAT. ANN. art. 6701h, § (2) (1965) (financial responsibility).

etc., will also be made part of that record. How is a court to evaluate effectively the rationale of the administrative decision if the actual decision criteria are unknown to it? And if court review is thus sterilized, what arm of government will protect the individual interest before the agency? Are licensing officials to be permitted to keep the PEOPLE and the courts ignorant of decision criteria and standards and thereby indirectly deprived of effective judicial review? Or is this to be considered permissible on the basis that driving is nothing more than a mere "privilege"?

RULE-MAKING PROCEDURES

Brief mention should be made of the procedural requirements by which rules are to be adopted. This is particularly relevant to the total public information problem in those instances where the public is allowed to participate in the rule-making function.

The administrative procedure statutes of at least five of the study states require agencies to give public notice of intended rule-making action.⁶³ Two further specify that the notice will contain the time and place of the meeting and, most important, a statement of the action proposed to be taken.⁶⁴ Such notification may be accomplished by newspaper publication or otherwise circulating it, and may vary from 10 to 30 days in advance of the rule-making meeting. Some states require agencies to maintain mailing lists to notify persons who have indicated their desire to be kept informed of rule-making activities. Several states give interested persons the opportunity to participate in rule making by filing written statements,⁶⁵ and some offer the possibility of oral presentation before the agency.⁶⁶ Indiana⁶⁷ and Ohio⁶⁸ require a formal hearing in addition to other requirements. In California and Michigan the public may petition the agency for adoption of rules believed necessary for proper administration of the statutes.⁶⁹ The upshot of such procedural requirements for rule making is that rules made in disregard of them are commonly declared ineffective or invalid even though filed. In theory, such potential sanctions should inspire agencies to follow the procedural requirements meticulously.

Florida provides a procedure for individuals to obtain the declaratory

⁶³ CAL. GOV'T CODE § 11423 (West 1966); IND. ANN. STAT. § 60-1504 (Burns 1966); MICH. STAT. ANN. § 3.560(7a) (1967); OHIO REV. CODE ANN. § 119.03(A) (Page 1965); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 2(c) (1965).

⁶⁴ CAL. GOV'T CODE § 11424 (West 1966); IND. ANN. STAT. § 60-1504 (Burns 1966).

⁶⁵ CAL. GOV'T CODE § 11425 (West 1966); MICH. STAT. ANN. § 3.560(7a) (1967); TEX. REV. CIV. STAT. ANN. art. 6252-13, § 2(c) (1965).

⁶⁶ E.g., CAL. GOV'T CODE § 11425 (West 1966).

⁶⁷ IND. ANN. STAT. § 60-1504 (Burns 1966).

⁶⁸ OHIO REV. CODE ANN. § 119.03(c) (Page 1965).

⁶⁹ CAL. GOV'T CODE, §§ 11426, 11427 (West 1966); MICH. STAT. ANN. §§ 3.560 (21.12), 3.560(21.3) (1967).

judgment of a court as to both the validity and the applicability of agency rules.⁷⁰ In California and Ohio a similar procedure is provided but is limited to court determination of the validity of rules and not their applicability.⁷¹

The described procedural requirements, sanctions against the agency for their violation, and potential court review of driver licensing rules should serve as food for thought for the organizations that are composed of drivers in these and other states. Motor clubs could serve a useful purpose by familiarizing themselves with the rule-making requirements of the states in which they are located. They could keep themselves apprised of rule-making activities, ask to be kept notified of proposed rule making, present the motorist's point of view where permitted to appear before licensing agencies, petition for the adoption of rules that appear to be needed, and perhaps challenge existing rules. And, most important, by assuming this new responsibility on behalf of their members, they could keep the membership informed of rule-making proceedings and needed rule revisions, and they could even suggest the need for individual petitions to licensing agencies for new or better rules. In this fashion the individual interest in driving would have a more active voice in the development of driver license programs.

There can be little hope for such a voice otherwise. For one reason, individuals ordinarily do not know what administrators are doing. For another, the driving public, though large in numbers, consists of individuals who have no vital group concern to draw them together to protect their driving interests. Consequently, motor clubs possess an unexploited potential for protecting the individual interest in driving and keeping the public informed as to developments in the licensing process.

AVAILABILITY OF RULES

Promulgation and filing of useful procedural, interpretive, or legislative rules is of little real value unless those rules are readily available for study. Of course, central filing of rules gives constructive notice to the public, but filing does not ensure that the rules may actually be located. The secretary of state of one state responded to an inquiry for copies of driver licensing rules filed in his office that there was no procedure by which to locate and obtain the rules needed other than by purchasing photostats of the entire 95 pages of rules filed in a single book containing, among others, those of the licensing agency. Apparently the rules are not indexed and maintained in useful form for efficient extracting. But further, even if properly indexed and maintained by the secretary of state or some other official, the fact remains that the only place where the rules are available is at the state capitol.

⁷⁰ FLA. STAT. ANN. § 120.30 (1965).

⁷¹ CAL. GOV'T CODE, § 11440 (West 1966); OHIO REV. CODE ANN. § 119.11 (Page 1965).

Because licensing hearings are not necessarily conducted at the central office of the agency, many attorneys throughout some states are not properly equipped to give meaningful counsel to their clients in licensing disputes. As a result, drivers are poorly represented in licensing matters unless the attorney may obtain copies of filed rules from the secretary of state or from the agency itself.⁷² Even so, when rules are obtained from the agency there may be the nagging worry that there is some later revision, that some of those received may not have been filed as required, or that what was received may be incomplete. The lawyer would prefer to examine all the rules actually on file and select for himself those he believes relate to his client's cause.

In some states the attorney is aided in his task because the filed rules of state agencies are published and made available for distribution.

California publishes the *California Administrative Code*, supplemented regularly by the *California Administrative Register*. The subject of motor vehicles appears as title 13 in the *Code* and *Register*. These publications may be purchased on a subscription basis. Law libraries may have this series.

Florida codifies and publishes its regulations in the *Florida Administrative Code*, a two-volume loose-leaf series supplemented regularly and obtainable by subscription from the secretary of state.

Indiana published its rules in 1947 and provides annual supplements thereto.

Michigan revises its bound volume entitled *Michigan Administrative Code* each 10 years and publishes quarterly and annual supplements in the interim.

New York publishes what is probably the most sophisticated compilation of rules and regulations of any state. This is a loose-leaf series of approximately 20 volumes, supplemented periodically. However, the cost of the *Official Compilation of Rules and Regulations of the State of New York* is prohibitive.

Ohio law requires each agency to publish copies of the laws it administers and to include agency regulations in the compilation.⁷³ Thus, driver licensing laws and filed rules relating thereto may be obtained from the Bureau of Motor Vehicles of that state.

In Illinois, New Jersey, Pennsylvania, and Texas, licensing agency rules must be obtained from either the secretary of state or directly from the agency. There is no official publication of rules in these states, and the licensee or his attorney may be forced to make a trip to the state capitol to search the central records to obtain the needed information. In the event the appropriate rules are obtained from licensing officials, comparison with those filed in the central records is necessary to be certain the rules received correspond with those on file.

⁷² A state-by-state analysis of rule filing and publication requirements and means of obtaining copies of rules is set forth in Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFF. L. REV. 410 (1964-65).

⁷³ OHIO REV. CODE ANN. § 119.05 (Page 1965).

18

POSITIVE-NEGATIVE DUE PROCESS AND ARTICULATION OF DECISION CRITERIA

The concepts developed in this chapter are based on what may be termed a positive-negative analysis of due process of law.¹ It is elemental that constitutional due process imposes both procedural and substantive checks on assertions of power by government that infringe on individual interests. Hence, due process is usually given a negative or limiting connotation. That is to say, government cannot deny an individual his life, liberty, or property without following methods that are deemed fair. About the most that may be said of due process in the abstract is that it is the embodiment of judicial notions of fairness.² Furthermore, the judiciary recognizes that due process is not necessarily judicial process,³ for the processes of administrative agencies may satisfy constitutional due process requirements.

Government is sometimes denied the use of its substantive authority in the name of due process on the theory that the particular assertion

¹ For a similar analysis suggesting that government may be required to act positively in the general public interest in order that opportunities for individual development and enjoyment of so-called liberties within a social organization may be ensured, see A. Miller, *An Affirmative Thrust to Due Process of Law?*, 30 GEO. WASH. L. REV. 399, 422-25 (1962).

² In discussing procedural due process in an administrative law context, the Supreme Court has said: "Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings." *Hannah v. Larche*, 363 U.S. 420, 442 (1959).

³ "Due process of law is not necessarily judicial process; much of the process by means of which the government is carried on, and the order of society maintained is purely executive or administrative, which is as much due process of law, as is judicial process." *Weimer v. Bunbery*, 30 Mich. 201, 211 (1874).

of power constitutes an unacceptable interference with individual interests.⁴ However, the judiciary will not readily inject itself into the legislative policy process and evaluate or reassess the wisdom of legislation.⁵ The courts recognize that the other branches of government are capable of governing wisely and have discarded the view that the judicial branch has the sole capability of determining what governmental action is appropriate for society.⁶ This is particularly true of the federal courts, whereas state courts are less reluctant to evaluate the wisdom of the legislative choices as expressed in statutes.⁷ Thus, if there is some "reasonable" or "rational" relation between the provisions of a statute and the legislative purpose or goal to which the statute is addressed, the substantive due process inquiry of the court is at an end.⁸ Hence, the day is said to be gone when the U.S. Supreme Court will use substantive due process to strike down legislation solely on the basis of its desirability.⁹

⁴ *Griswold v. Connecticut*, 381 U.S. 479 (1965), concurring opinion of Justice Goldberg; *NAACP v. Alabama* 377 U.S. 288, 307 (1963): "[G]overnmental purpose to control or prevent activities conditionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom. . . ."

⁵ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965), from the majority opinion of Mr. Justice Douglas, discussing *West Coast Hotel*, *Lochner*, etc.: "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."

⁶ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Williamson v. Lee Optical Company*, 348 U.S. 483, 488 (1955): "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Railway Express Agency v. New York*, 336 U.S. 106 (1949).

⁷ M. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13 (1958).

⁸ *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

⁹ *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937): "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." Language that implies a more stringent test on the point of rational or reasonable relationship between the statute and its subject was used by Justice Goldberg (Chief Justice Warren and Justice Brennan joining the opinion) concurring in the decision in *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965): "In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose." This line of thought would seem to suggest that a mere rational relation to any legitimate legislative power might not satisfy substantive due process wherever "fundamental personal liberties" are involved. A similar line of thought and test are set forth by a majority of the Supreme Court in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 666 (1966), where the court considered and held invalid Virginia's poll tax as violative of the equal protection clause of the 14th amendment. The majority opinion stated: "The *Lassiter* case does not govern . . . unlike a poll tax . . . [read-

Manifestly, the traditional function of due process of law is to limit either governmental assertions of power (substance) or the methods of their implementation (procedure), although it is admitted that the precise point of limitation may vary with the context in which the question arises. The due process concept is not mechanistic or compartmentalized despite the continuing search of some courts for certainty in the area.¹⁰ In short, the question "What is due process?" cannot be answered definitively in the abstract but only in a given context, for the meaning of due process varies from problem to problem.

On the other hand, the positive aspect of due process is not articulated and is not often recognized. The essence of positive due process is simply that government (especially the courts) also has a responsibility to act *positively*, that is, to do something *affirmatively* if necessary to make effective the corollary *negative*, limiting aspect of due process. Both facets come under the broad reach of the "fairness" concept that due process represents. The positive due process notion has two divisions.

First, it has been suggested that government has an obligation to act affirmatively, and it is a judicial responsibility to enforce this obligation so that the general public interest may be served.¹¹ In essence, this imposes a duty on government and the courts in a "positive state" to provide for the members of the society. In general, this means providing an opportunity for full development of the various freedoms, interests, liberties, rights, and privileges comprising the whole scheme of individual social interests that our government was designed to protect and enhance.¹²

ing and writing] has some relation to standards designed to promote *intelligent use of the ballot*." (Emphasis added.) Justice Black dissented, preferring to test, not on the basis of a relationship to intelligent use of the ballot, but simply on relationship to any one of a number of permissible *general* state purposes including, among others, "the State's desire to collect its revenue. . . ." *Id.* at 677.

¹⁰ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *Hannah v. Larche*, 363 U.S. 420, 422 (1959): "'Due Process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual context." *Harper v. Virginia Board of Elections*, *infra* note 14.

¹¹ *Miller*, *supra* note 1, at 422-25.

¹² *Id.* Refer to right-privilege discussion in earlier chapters. That the right-privilege dichotomy continues to have vitality is evident in a recent U.S. Court of Appeals decision involving a liquor license, *Lewis v. City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966). In this opinion the court rejects the approach of the Fifth Circuit in liquor licensing cases which is to ignore the right-privilege labeling and admit due process is applicable: *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), *rehearing denied*, 330 F.2d 55 (1964); *Bechler v. Parsekian*, 36 N.J. 242, 176 A.2d 470, 478 (1961); *Cinco v. Driscoll*, 130 N.J.L. 535, 34 A.2d 6, 10 (1943):

Neither prosecutors' tenuous legal status as licensees to sell alcoholic beverages . . . nor the character of the proceeding, be it quasi-judicial . . . or administrative . . . could operate to deprive the prosecutors from a hearing of their appeal under the Alcoholic Beverage Law in accordance with the fundamental judicial requirement of "fair play."

A second aspect, and the one of most immediate concern, is the idea that the judiciary, in its review role, has a correlative due process duty to force government to act positively in order that it (the court) may intelligently apply traditional due process limits on governmental power.

Some of the other premises on which the discussion proceeds should be mentioned. The most important is rejection of the right-privilege dichotomy as meaningless in due process analysis and constituting nothing more than a device that enables courts to avoid constitutional issues. The reason for this rejection is that right-privilege thinking leads to attempts to build a catalogue of "rights" and "privileges" in a simplistic either/or fashion. This is done for the purpose of deciding what interests are within the meaning of the words life, liberty, and property in the due process clause. The resulting catalogue of "rights" is protected, whereas that of "privileges" is not. This is an oversimplified, mechanistic approach to due process issues.

Conversely, analysis that goes beyond the labeling stage leads to the conclusion that almost any interest or group of interests that is socially valuable to an individual may be included within the beautifully vague phrase "life, liberty, or property." This compels a further assumption that due process applies to government power assertions in *all* contexts where valuable interests of the individual and the public clash,¹³ and that what constitutes acceptable due process fairness *may* and *does* legitimately vary from context to context. The mechanical attempt to compile a catalogue of content for the words "life, liberty, and property" is therefore avoided.

Furthermore, the recognition of due process as a flexible concept makes it apparent that as societal and individual interests change, due process fairness (of substance or procedure) may also change.¹⁴ There is no attempt to create a permanent catalogue of interests that are immutable and unchanging because yesterday's due process may be today's arbitrary and capricious action.¹⁵

If these premises are accepted as valid, it follows that both positive and negative principles apply to driver license administration. If the assumption is correct that due process applies to driver licensing, our first concern is with the degree to which the traditional negative due process aspects of judicial review are effectively utilized by courts to control driver licensing agency power. To review is to imply an *effective* review,

¹³ *Lamb v. State*, 406 P.2d 1010, 1015 (Okla. 1965): "Due process of law is not confined to judicial proceedings but extends to every case which may deprive a citizen of life, liberty, or property whether the proceeding be judicial, administrative, or executive in nature."

¹⁴ *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966): "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."

¹⁵ *Id.*

and for it to be effective the court must have information and data as to the administrative processes actually employed by licensing officials. This would include policies, standards, and criteria in addition to procedure. The policies, standards, and criteria of driver licensing agencies cannot be determined by analysis of administrative agency opinions, for they are not readily available. Therefore, the sole sources of information are (a) the agency itself, (b) its published statements of policy, if any, and (c) agency rules and regulations. Thus, it may be argued that the positive aspect of due process obligates the courts to force the agency to provide information as to its actual decision-making criteria and processes to ensure that the court's traditional (negative) due process review is complete and meaningful in the constitutional sense. Simply stated, the problem is, How may a court be certain it is rendering *effective* review of agency action (negative due process) without knowledge and evaluation of policies, criteria, and methods used by the agency?¹⁶ Positive due process would require agency articulation of all policies, criteria, and methods that the agency creates and uses, whether or not those policies and criteria are promulgated in the form of rules and regulations.¹⁷ The unique feature of the positive due process concept is that it may be used to force government to explain more precisely how the governed are being governed. The New Jersey Supreme Court has expressed it thus:

Persons subject to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are

¹⁶ The more traditional approach to control of agency discretion is to insist on stricter legislative standards in the statutes administered by agencies. *E.g.*, Bomar, *Due Process and Red Tape*, 17 AD. L. REV. 206, 208 (1964); MacDonald, *The Need for Standards in the Selection of Licensees*, 17 AD. L. REV. 61, 69 (1964). Positive due process would emphasize rules created by the agency rather than stressing the need for stricter legislative standards. *See also* Pierce, *The Act as Viewed by an Academician*, 16 AD. L. REV. 50, 51 (1963):

A study of the legislation establishing a particular agency provides us with only a minimum guide as to the rules of law governing persons coming within a jurisdiction of the agency. On paper these general standards may appear innocuous and clearly within the public interest, but in practice anarchy or rules of the jungle may prevail. . . . If our research reveals no adequate utilization of the rule-making power, we have no way of advocating whether or not the agency is acting wisely, lawfully, or consistently. Quite often we find that the agency has not promulgated any meaningful rules. In these situations it is obviously impossible for us to reach any conclusions regarding the adequacy or inadequacy of the administration of the particular body of law. . . .

Rask v. Board of Bar Examiners, 75 N.M. 617, 409 P.2d 256 (1966).

¹⁷ Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968); Hornsby v. Allen, 326 F.2d 605, 610 (5th Cir. 1964), *rehearing denied*, 330 F.2d 55 (5th Cir. 1964); *cf.* Pollack v. Simonson, 350 F.2d 740 (D.C. Cir. 1965); Boller Beverages, Inc. v. Davis, 38 N.J. 138, 183 A.2d 64, 73 (1962); *see* Morrell v. Hjelle 128 N.W.2d 728 (N.D. 1964); NLRB v. E & B Brewing Co., 276 F.2d 594 (6th Cir. 1960); NLRB v. Guy F. Atkinson Co., 195 F.2d 141 (9th Cir. 1952).

restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation.¹⁸

Knowledge makes it possible for courts to determine more rationally whether the due process fairness appropriate to driver licensing has been in fact accorded the individual. Concurrently, this sort of review serves as well to protect the public interest by making known how administrative power is used.

POSITIVE-NEGATIVE DUE PROCESS AS PRODUCER OF PUBLIC INFORMATION

That traditional due process review by courts must be based on adequate knowledge if it is to be effective is apparent. However, should the due process concern be limited to court review? Does it follow that the due process admonitions of the Constitution are directed solely to the judiciary, are solely the business of the courts, and then only in terms of judicial review? Is the interest of the body politic in due process of law solely to listen and be told by the courts what is appropriate?

If government in our system is representative, emanating from the people as a whole, it is reasonable to argue that people have an interest (protected by due process) in knowing what government is doing, in order that they may make their own evaluations as to the fairness or unfairness of the processes by which it deprives individuals of valuable interests within the words "life, liberty, or property." It is conceivable the public may not agree with the courts in their interpretations of what is fair. Does it follow that the public must nevertheless accept "what is as right," on the basis that the courts say so?¹⁹ Does not the public have a due process interest in participating in the "community experience through which American policy is made"?²⁰

¹⁸ *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 183 A.2d 64, 71 (1962).

¹⁹ A. Miller, *Malaise in the Administrative Scheme: Some Observations on Judge Friendly's Call for Better Definition of Standards*, 9 *How. L. J.* 68, 79 (1963): "[T]he problem in all of this may be simply stated. It is to get government to govern adequately. If government will not, then what is the remedy? Are we fated to have to accept that 'whatever it is, is right?'"

²⁰ Rostow, *The Democratic Character of Judicial Review*, 66 *HARV. L. REV.* 193, 208 (1952):

The process of forming public opinion in the United States is a continuous one with many participants—Congress, the President, the press, political parties, scholars, pressure groups, and so on. The discussion of problems and the declaration of broad principles of the courts is a vital element in the *community experience* through which American policy is made. (Emphasis added.)

Dean Rostow thus defends the legitimacy of the concept of judicial review, but he also recognizes that American policy is made by "community experience" and not the court, or other branches of government, or the public acting alone. Court review is only one ingredient. Do not the courts have an obligation to make it possible for the other contributors to add their own ingredients?

There are those who assume that (a) the "law" consists of statutes and decisions of courts and licensing officials; and (b) it is the sole concern of the courts to administer and interpret the "law"; and (c) nothing can be done because the courts have ultimate review authority.²¹ But this thinking is contrary to the notion of representative government, for the public does have a stake in being informed. An informed public may bring about changes in policy, *i.e.*, "law" (both statutory and decisional), through the traditional political processes. In short, the governed may be said to have a due process right to know how they are being governed (*i.e.*, "deprived" in the due process sense), to permit expression of their evaluations through political channels. Without adequate information this "public due process" review of administrative action is frustrated. In situations where courts are powerless to review for one reason or another, *e.g.*, where statutes foreclose judicial review of administrative action,²² should this mean that due process clause protections are neutralized and control over administrative discretion is lost entirely on the theory that *only courts* may assess governmental action in due process terms? ²³ Some sort of due process evaluation must be made somewhere in society or gross unfairness may go unchecked.

Whether or not the public has a right to make its own due process evaluations, what of the right of the other branches of government to make their own assessments of government deprivation of individual interests on substantive and procedural grounds as part of the "community experience through which American policy is made"? ²⁴ Clearly the executive and the legislature have powers and responsibilities to both the Constitution and the public for the conduct of administrative agencies. As it has developed, American administrative law has legitimated the role of the courts in reviewing agency use of legislative and judicial powers, but it has failed to give adequate attention to the legitimate role of the legislature and the executive in making their own evaluations of the administrative process in due process of law terms.

If the legislature assesses the fairness of agency policies and procedures and its assessment sees unfair deprivation while the courts see none, it has independent power to act and require more stringent standards of fairness. For this principle to operate, the legislature must have *knowl-*

²¹ *Marbury v. Madison*, 1 Cranch 137 (1803).

²² Such foreclosure is permitted in some instances. See *Dismuke v. United States*, 297 U.S. 167 (1936); *Schilling v. Rogers*, 363 U.S. 666 (1960). See also 4 DAVIS, ADMINISTRATIVE LAW TREATISE, §28.18 (1958); 2 COOPER, STATE ADMINISTRATIVE LAW, 677-78 (1965); *Reed v. Alger*, 327 Mich. 108, 41 N.W.2d 491 (1950); *Goodwin v. Superior Court*, 68 Ariz. 108, 201 P.2d 124 (1949); *Allen v. Durand*, 137 N.J.L. 30, 57 A.2d 668 (1948); *Panama Canal Co. v. Graceline*, 356 U.S. 309, 317 (1958); *Switchman's Union v. National Mediation Board*, 320 U.S. 297 (1943).

²³ That court review may not be a necessary element of constitutional due process, despite statutory language, is discussed in 4 DAVIS, ADMINISTRATIVE LAW TREATISE, §28.18 (1958).

²⁴ Rostow, *supra* note 20.

edge of agency actions—a by-product of positive-negative due process review by courts.

A final point on the need for “public information due process” is that the academic community needs to know what administrative agencies are doing in order to make intelligent studies and evaluations of agency policy and practice.²⁵ Perhaps there is no constitutionally protected interest requiring information to be made available to academicians, but information means analysis, analysis permits criticism, and scholarly criticism constitutes part of the total mix by which American policy is made.²⁶

It is ironic that traditionalists would perhaps reject this approach to due process as part of the function of judicial review of administrative action. They generally insist that the courts are the final interpreters of constitutions, that only the courts give meaning to due process clauses, and that due process applies only in specific cases or controversies before courts. What seems to be overlooked is that, as the direct and primary enforcer of due process, it is a judicial responsibility to ensure the availability of information to the other participants in policy making.

The Supreme Court has said that rational and reasonable legislation addressed to social and economic problems is the equivalent of substantive constitutional due process.²⁷ Does this not imply (a) broad legislative authority and (b) an obligation on the courts to assist legislators in meeting the terms of the due process standards by which they will evaluate the legislation? Or must legislatures be expected to legislate in a “public information due process” vacuum, without knowledge of agency policies and procedures that they might choose to revise? ²⁸

POSITIVE-NEGATIVE DUE PROCESS AS PRODUCER OF ADMINISTRATIVE STANDARDS

In his Holmes lectures ²⁹ Judge Friendly does not suggest how the judiciary may help press agencies toward the goal of better articulation

²⁵ Pierce, *supra* note 16, at 50-51.

²⁶ Rostow, *supra* note 20.

²⁷ Professor Charles Black rejects the simple rational relationship test statement of the substantive due process criterion used by the U.S. Supreme Court when evaluating legislation. He supports his contention that where some “liberties” are involved more than mere rationality is required with an analysis of the Supreme Court holding in *Pierce v. Society of Sisters*, 268 U.S. 510 (1928), and concludes with the proposition that “some interests can confidently be identified, even under the due process clause, which are too precious for the legislature to tamper with on mere grounds of arguable relation to worthy societal aims. . . .” C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 80-82 (1963). *Accord*, Goldberg, *supra* note 9.

²⁸ See Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 *BUFF. L. REV.* 410 (1964-65).

²⁹ H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS* (1962).

of standards.³⁰ The positive-negative due process concept could become a useful tool of the courts to apply pressure for public articulation of decisional criteria used but not formalized as policies or as rules. This would be especially true of state agencies in general and state driver licensing officials in particular.

Perhaps positive-negative due process may be used in some contexts to press agencies to create substantive policies and standards where none exist. Are agencies to be permitted to use the principle of relatively free choice of methods of policy creation, often described as the *Chenery* doctrine,³¹ as a legitimate reason for failing to make policy through rule making? In a recent case,³² Judge Friendly said: "There has been increasing expression of regret over the Board's [NLRB] failure to react more positively to the Supreme Court's rather pointed hint, *SEC v. Chenery Corp.*, . . . that since an administrative agency has 'the ability to make new law prospectively . . . it has less reason [than a court] to rely upon *ad hoc* adjudication to formulate new standards of conduct. . . .'"³³ However, he suggests no judicial device by which the practice may be combated. Perhaps a reconsideration of *Chenery* is in order.

Chenery and Agency Choice of Method to Create Policy

To understand the *Chenery* problem fully, it is essential to recognize that there are two Supreme Court opinions to be considered. In the first case,³⁴ Mr. Justice Frankfurter's opinion for the Court took the Securities and Exchange Commission (SEC) to task for arriving at its decision to disapprove certain insider dealings in a corporate reorganization by the application of what the Commission believed to be a proper interpretation of judicial principles regarding fiduciary relationships.³⁵ Because of its erroneous application of those principles the matter was remanded to the SEC for further proceedings. After an

³⁰ For a view that he too hastily dismisses the judiciary, see Miller, *supra* note 19, at 77-78.

³¹ *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947). Of similar import is an earlier expression in *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 106 (1946). Cf. *Rhode Island Television Corp. v. FCC*, 320 F.2d 762, 766 (D.C. Cir. 1963).

³² *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966).

³³ *Id.* at 860.

³⁴ *S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943).

³⁵ 318 U.S. 80, 89-90, 92-94 (1943):

Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, *i.e.*, those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established judicial principles. . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. . . .

amendment to the proposed action, the Commission restated the rationale and rendered the same decision as in the first case. In its second appearance before the Court,³⁶ a majority of the justices sustained the action of the Commission on its new rationale, which did not rest solely on judicial principles as before. In dissent, Justices Frankfurter and Jackson were horrified by this retroactive method of making policy, particularly in view of the first opinion.³⁷ They interpreted the first decision to bind the SEC to amend its order, allow the proposed corporate transaction to be consummated, and promulgate a general rule for prospective application in future cases.

Writing for the majority, Mr. Justice Murphy replied that this was a misinterpretation of the prior decision, and said the

. . . administrative process had taken an erroneous rather than a final turn. Hence we carefully refrained from expressing any views as to the propriety of an order rooted in the proper and relevant considerations. . . . After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress. . . .³⁸

Thus, the Court established the principle that agencies may create policy prospectively by rule making or retrospectively through the method of case-by-case adjudication, especially where, as here, the agency could act only by an adjudicative order because of the lack of a previously adopted general rule or regulation. Manifestly, such a holding could be (and is) cited as leaving agencies a choice to proceed by either (a) rule making or (b) adjudication. Unfortunately, what seems to be sometimes overlooked is the Court's further explication of the matter of choice. The following language negates the contention that agencies have *carte blanche* authority in the matter of choice:

Since the Commission, unlike a Court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects,

³⁶ *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947).

³⁷ *Id.*

³⁸ *Id.* at 200-201.

therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by a general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.³⁹

First, analysis of this language makes evident several points. *Chenery* does not stand for the proposition that agencies are free to develop standards and criteria of judgment that are used and described in staff manuals, operating instruction manuals, staff bulletins, etc., without announcing them publicly or filing them as rules as is normally required by federal and state administrative procedure acts.⁴⁰

In *Chenery* there was no dispute over the fact that the SEC had given no prior consideration to the problem of insider dealings. There was no secret guideline. The agency was genuinely pursuing the case-by-case method of evolving standards and criteria.

Driver licensing administrators who have created decision criteria and standards that could be stated formally as rules will find little comfort for their practices in the *Chenery* decision. Its rationale does not permit them to avoid their duty to publicize the policies of which the public should be informed.

Second, the Court states that administrative agencies have less reason to rely on the case-by-case method of policy creation. Unlike courts, which act only on a case-by-case basis, administrative agencies have the power to fill in the necessary details of the statutory framework within which they operate. Because of this distinction, analogies to court practices in making law retrospectively are not necessarily appropriate.⁴¹

³⁹ *Id.* at 202-03.

⁴⁰ The Court of Appeals of New York has held void a regulation created and used but not filed in the office of the secretary of state in accord with art. IV, § 8 of the state constitution: *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495 (1961) (Order of State Traffic Commission establishing a 35-miles per hour speed zone). The Court said giving notice to the public of the rules was not the sole purpose of the provision. It also permits examination of the rule to determine its legality, effectiveness, or accuracy, and thus posted speed limits did not cure the failure to file.

⁴¹ Court decisions commonly have a retroactive law-making (*i.e.*, policy-making) effect. *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Gideon v. Wainwright*, 372 U.S. 335

As was mentioned earlier, most licensing agencies may adopt their standards and criteria as "little laws" by promulgating them as rules and regulations. Most driver licensing administrators in the study states have failed to make full use of this authority.

Third, to avoid stifling the desired flexibility of the administrative process, the licensing agency needs an alternative method for use when it would not be sensible to make rules. Here the Court gives specific guidance. If the agency confronts a problem which it "could not reasonably foresee,"⁴² or where the agency does not have "sufficient experience"⁴³ with a problem, or where the problem is "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule,"⁴⁴ then (and perhaps only then) the agency is permitted to *evolve* policy on a case-by-case basis. Presumably, when these circumstances do not exist the agency is expected to use the rule method. It could be argued that the Court, in effect, *insists* that it be used in the absence of the described circumstances justifying the ad hoc method. In any event, it is clear the Court does not state that agencies may ignore their rule-making power and freely act in ad hoc fashion without consideration of the *impact* of retroactive action on the interests of PEOPLE.

Fourth, the Court states that the choice of method "is one that lies primarily in the informed discretion of the administrative agency."⁴⁵ The complete statement appears to imply some qualifications through the Court's use of the phrase "informed discretion" and its enunciation of prerequisite circumstances that justify use of the ad hoc method. Implied in the phrase "informed discretion" is the condition stated by Mr. Justice Murphy:

But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.⁴⁶

Courts are thus charged with the duty to assess retroactive effects by balancing furtherance of the public interest against the extent of the injury done the individual interests being regulated. It is essential that this balancing responsibility be met.

It would appear that the Supreme Court has laid a foundation that permits courts to insist that agencies make policy by rules unless ad hoc

(1963); *Doughty v. Maxwell*, 376 U.S. 202 (1964); K. Davis, 2 ADMINISTRATIVE LAW TREATISE, § 17.08 (1958).

⁴² 332 U.S. 194, 202 (1947).

⁴³ *Id.*

⁴⁴ 332 U.S. 194, 203 (1947).

⁴⁵ *Id.* See *Mitchell v. Cavicchia*, 29 N.J. 11, 101 A.2d 575, 577 (1953).

⁴⁶ *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

decisions are clearly justified. All that is necessary is that courts interpret the phrase "informed discretion" as justifying *genuine* court assessment of the agency choice. The court's rationale may be stated as an issue of agency abuse or nonabuse of discretion, or as part of the larger concept of positive-negative due process, or both. So analyzed, *Chenery* is consistent with positive-negative due process. Hence, *Chenery* does not prevent courts from forcing articulation of existing but confidential agency standards and, except where the stated justifications are present, from insisting on creation of original agency policy by rules.

Courts are justified in presuming there is no justification for ad hoc decisions except where one of the three conditions is present, and even so, a *genuine* balancing of interests may dictate court insistence that the agency proceed by rule making because of the undue harm of retroactivity. In driver licensing, where great masses are regulated rather mechanically, and where agencies have years of experience with multitudes of problem variations, and where written decisions do not exist, to insist that agencies make policy by rules would not seem to be incongruous or impracticable. Conversely, rules may provide fairness without sacrificing efficiency. The availability of criteria makes traditional due process review of licensing decisions more meaningful and allows it to penetrate more deeply into the process by which the decision was made. Although they are not numerous, there are several cases in which courts have required agencies to make policy by rule and have in essence voided the agency choice to proceed in ad hoc fashion.⁴⁷

Decisions Requiring Articulation of Standards

In *Hornsby v. Allen*,⁴⁸ a Mrs. Hornsby had been denied a license to operate a retail liquor store by the municipal liquor licensing board. She brought an action in Federal District Court against the board based on 28 U.S.C. § 1343⁴⁹ and 28 U.S.C. § 2201⁵⁰ to redress an alleged deprivation

⁴⁷ *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d. Cir. 1968); *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d. Cir. 1966); *NLRB v. E & B Brewing*, 276 F.2d 594 (6th Cir. 1960); *NLRB v. Guy F. Atkinson*, 195 F.2d 141 (9th Cir. 1952); *Churchill Tabernacle v. FCC*, 160 F.2d 244 (D.C. Cir. 1947); *Heitmeyer v. FCC*, 95 F.2d 91, 98 (D.C. Cir. 1937); *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 183 A.2d 64, 73 (1962): "Where an administrative agent is given full rule-making power, he must in all fairness, bottom an alleged violation on general legislation before he may rule in a particular case. The general mandate either statutory or administrative must precede the specific violation."

⁴⁸ 326 F.2d 605 (5th Cir. 1964). Petition for rehearing denied, 330 F.2d 55 (5th Cir. 1964). See also *City of Lawrence v. CAB*, 343 F.2d 583 (1st Cir. 1965).

⁴⁹ "The district courts shall have original jurisdiction of any civil action . . . commenced by any person: (1) to recover damages . . . because of the deprivation of any right of privilege of any citizen of the United States. . . ."

⁵⁰ "In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration. . . ."

of civil rights and for a declaratory judgment. She alleged *inter alia* that she met all requirements as to moral character and proposed location of the store, but that her application was denied without a reason. In her view this constituted (a) arbitrary and capricious action by an administrative agency and (b) contravention of the due process and equal protection clauses of the 14th amendment. The lower federal court dismissed the complaint on the ground it involved only a political question.⁵¹ On review, the Circuit Court of Appeals rejected the contention that liquor licensing should be characterized as legislative in nature. The court said:

Although there is disagreement on the matter . . . we prefer the view that licensing proper is an adjudicative process. Thus when a municipal or other governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with the prescribed standards for the award of that license. Similarly the denial of a license is based on an adjudication that the applicant has not satisfied those qualifications and requirements. On the other hand, the prescription of standards which must be met to obtain a license is legislation, since these standards are authoritative guides for future conduct derived from an assessment of the needs of the community. A governmental agency entrusted with the licensing power therefore functions as a legislature when it prescribes these standards but the same agency acts as a judicial body when it makes a determination that a specific applicant has or has not satisfied them.⁵²

Concluding that liquor licensing constitutes adjudication, the court then held that due process and equal protection requirements apply to it.⁵³ The court then began its due process-equal protection assessment of the agency practices. In so doing, the court implied it viewed Mrs. Hornsby's interest in obtaining a liquor license as within the meaning of the "life, liberty, or property" language of the due process clause of the 14th amendment. It so stated at another point in the opinion.⁵⁴

The court next confronted the appellee's argument that since the state had declared "a license to sell spiritous liquor to be a privilege, the licensing authority has unreviewable discretion to grant or deny licenses."⁵⁵ To this contention the court replied simply: "Merely calling a liquor license

⁵¹ Apparently the lower court characterized the liquor licensing function as "legislative" action by an administrative agency as distinguished from an "adjudication" of individual rights. Thus, it reasoned the judiciary could not interfere with the local administrative process of liquor licensing because to do so would violate the tradition of separation of legislative and judicial functions.

⁵² 326 F.2d 605, 608 (5th Cir. 1964).

⁵³ *Id.* at 608.

⁵⁴ *Id.* at 611-12:

Judging Mrs. Hornsby's complaint in the light of the requirements that it set forth (1) that plaintiff has been denied a protected right, privilege or immunity, and (2) that defendants acted under color of a state or local law . . . we find she has set forth an actionable claim within the jurisdiction of the District Court.

⁵⁵ *Id.* at 609.

a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion."⁵⁶ It is interesting to note that, historically, it would be difficult to imagine an interest further to the "privilege" side of the "right-privilege" spectrum than selling liquor. Surely, driving a motor vehicle would be entitled to the same or a greater degree of due process protection.

Of prime importance is the court's discussion of its reasons for holding that the lower court should have sustained its jurisdiction and heard the merits of the case. First, the court pointed out if appellant's allegations proved true she was denied a hearing which due process would require (procedural due process) and, second, "In addition, Mrs. Hornsby was not afforded an opportunity to know, through reasonable regulations promulgated by the board, of the objective standards which had to be met to obtain a license."⁵⁷ That the court affirmatively forced articulation of standards by rule making through application of the 14th amendment is apparent from the order it issued. The trial court was instructed to hear the allegations and determine their truth. If no ascertainable standards had been established by the Board of Aldermen by which an applicant could intelligently seek to qualify for a license, then the court was to enjoin the denial of licenses under the prevailing system *until a legal standard was established* and procedural due process provided in the liquor licensing field.⁵⁸

The court's order gives direct support to the positive-negative due process concept and serves to demonstrate that (a) it is not far-fetched, (b) it may be applied to administrative agencies by courts on review, and (c) this can be done without violating the tradition of limited court review of agency action.

Similar thinking was used by the Circuit Court of Appeals for the District of Columbia in *Pollack v. Simonson*.⁵⁹ As in *Hornsby*, this case involved liquor licensing, but the matter for administrative decision was

⁵⁶ *Id.* *Accord*, *Costello v. New York State Liquor Authority*, 17 App. Div. 547, 236 N.Y.S.2d 453, 455 (1963). The Sixth Circuit has not accepted the Hornsby approach to the right-privilege conception. In *Lewis v. City of Grand Rapids*, 356 F.2d 276 (6th Cir. 1966), the court accepts the right-privilege concept as sufficiently meaningful for analysis, holds liquor licensing is a privilege, and concludes, therefore, that due process does not apply. The court is trapped in the right-privilege web.

⁵⁷ 326 F.2d 605, 610 (5th Cir. 1964). *Accord*, *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968).

⁵⁸ *Id.* On petition for rehearing the court reiterated its position, and said:

This court will not suggest how the determination should be made other than to point out that every applicant should be apprised of the qualifications necessary to obtain a license and should be afforded a reasonable opportunity to show that he does or does not meet them. . . .

330 F.2d 55, 56 (5th Cir. 1964). The concept was applied to protect rights of applicants for public housing in *Holmes v. New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968).

⁵⁹ 350 F.2d 740 (D.C. Cir. 1965).

the transfer of two existing liquor licenses to new locations that happened to be less than 300 feet apart. The second applicant for transfer attended the hearings on the application of the first but made no formal appearance, did not object to the application of the first, made no request to intervene, and did not ask for consolidation of the proceedings with the hearing on its own application. After hearings the Board granted the application of the first, but denied that of the second. The decision was based

on the sole ground that the Trio license had been "issued for another location less than 300 feet from [appellant's] proposed location, [so that] it would not be in the best interests of the persons residing or owning property in the neighborhood to grant another such license."⁶⁰

In its opinion disapproving the Board's action, the court pointed out that it had not been suggested to the applicants at either hearing that the two applications were mutually exclusive because the locations were in such close proximity. Similarly, the court stressed that no formal regulation of the District of Columbia Commissioners required that liquor stores be situated more than 300 feet apart.⁶¹ Thus, there was no reason for the second applicant (or the first applicant for that matter) to suspect the applications would be treated as mutually exclusive. On these facts the court held the Board failed to give proper notice of the mutually exclusive treatment of the applications. The court pointed out that the Board was authorized to make a finding that 300 feet would be too close proximity for this particular neighborhood, and continued:

But where the Board makes such a finding which affects simultaneously pending applications, the Board must necessarily choose between competing applicants. Unless these applicants are aware of their mutual exclusivity, the Board is deprived of any assistance from them in finding rational grounds to distinguish among them. Thus the statutory purpose—that specific public standards, not unbridled discretion, should control the Board's consideration of license applications—is jeopardized unless the Board gives each applicant some opportunity to show that his application should be favored.⁶²

Hence, this court required agency articulation of the decision criterion that had the effect of converting parallel applications into mutually exclusive applications. Furthermore, the agency was required to announce its newly created criterion *before* it reached a decision on the merits of the applications before it and out of which the new policy evolved. Manifestly, all administrative policies and rules such as this 300-

⁶⁰ *Id.* at 742.

⁶¹ The appellants alleged that the Board had, in fact, approved liquor sales outlets closer than 300 feet apart.

⁶² 350 F.2d 740, 742 (D.C. Cir. 1965).

foot rule are not of such a nature as to have an immediate impact in an adjudication between two license applicants. Nonetheless, this court could have chosen to follow the simplistic approach to *Chenery* and could have upheld the agency action on the theory the agency was making ad hoc policy on a case-by-case basis and that there was no unfairness of which the loser could complain. Yet, it did not do so. The court said its approach was necessary in order that "specific public standards, not unbridled discretion" should control agency action.

Unless limited to its particular facts, the decision implies an affirmative duty upon agencies to create and publicly articulate decision criteria prior to their use in a specific case.⁶³

Positive-negative due process is also important for the reason that driver licensing determinations are not normally made on the basis of a formal hearing record. The "record" is often nothing more than the agency file with perhaps statement summaries added. Where the record is informal, and where no rules have been promulgated, it is obvious that the review potential of the courts is quite limited. A *judicial* concept that recognizes the duty of reviewing courts to insist on the public articulation of decision criteria in use (as rules) allows the court to make a comprehensive negative due process-equal protection analysis of the licensing process although the "record" is informal. Obviously the licensing statutes are exposed to constitutional review, but, more important, the decision criteria are likewise subjected to such judicial scrutiny.

Possible approaches to the review function of the judiciary under the positive-negative due process concept might be as follows: (a) review as usual where rules exist and evaluate the rules also; (b) where no rules are published, insist on knowing the criteria used if the ad hoc decision process is not justified and, to avoid being misled by the agency, remand the case for a statement of criteria used on the basis of the positive aspect of due process; (c) decide if the ad hoc method is justified and if so, permit it to be used—but only after balancing the interests of the individual in having the agency act prospectively against the interest of the agency in making policy on an ad hoc basis; (d) if the ad hoc method of policy making is determined not to be justified, remand the case and order the agency to make and promulgate rules as was done in *Hornsby*.

Legislation Requiring Articulation of Standards

Another device by which driver licensing officials may be pressed to promulgate rules is to amend the enabling legislation of the agency to state that licensing officials *shall* promulgate rules and regulations. Most statutes use the permissive "may" and *permit*, rather than impose, an affirmative duty on the agency to adopt rules and regulations. Such a

⁶³ *Id.* Cf. *Boller Beverages, Inc. v. Davis*, 38 N.J. 138, 183 A.2d 64, 73 (1962). But see *B Family Finance Corp. v. Gough*, 10 N.J. *supra*, 13, 76 A.2d 82, 87 (1950).

requirement must not be viewed as absolute, for there is always the possibility of a case of first impression in driver licensing. Furthermore, some of the exceptional circumstances described in *Chenery* may arise, in which case the ad hoc method would be appropriate. However, it is questionable whether driver licensing officials usually may expect to be confronted with an unforeseen problem, or one with which they have had no experience, or one which is so specialized and varying as to be incapable of statement as a formal rule. The purpose of such a statutory requirement is to stress rule making in driver licensing administration and minimize but not eliminate the authority of the agency to choose to make its policies on an ad hoc basis where justified.

CONCLUSION

What effects could be expected to flow from court use of positive-negative due process? Through its traditional, passive role, the judiciary may act as a reformer. And of prime importance is the fact that it may do so without usurping agency policy authority.

First, judicial insistence on administrative rule making in driver license administration should bear fruit in the form of firm pressures for sophistication within the licensing process. By providing more information of its interworkings and correspondingly greater knowledge of the process, greater depth of judicial scrutiny is made possible. Knowledge by other branches of government, the public, and academic circles made possible through agency articulation of criteria permits discussion, criticism, and perhaps legislative change. This public information goal has been often stated, but there seems to be no serious suggestion that the judiciary may press agencies toward the goal through traditional court review techniques. Perhaps courts too often assume they have no power to insist that agencies make rules because of the pseudo-*Chenery* doctrine and their inherent fear of invading the policy area as courts did in the substantive due process era.

Second, it is vital to this framework for judicial review to understand that, contrary to the views of those who would ask that courts get more directly involved in evaluating the policies of agencies, what is sought is agency articulation of its own criteria, based on its own judgment. This approach is not to be confused with insistence that legislatures enact more specific standards in statutes. Such suggestions are unrealistic because, if feasible, the legislatures would have done so at the outset and probably would have had no need of an agency to implement legislative policy. To whatever extent the courts will make a substantive due process analysis of agency criteria, that review is possible only if the criteria are known. If substantive due process is not used, then all the more importance attaches to criteria evaluation by other branches of government and the public. Only with knowledge of what is happening may they evaluate.

Third, policy established by rule and announced publicly presses for

consistency of its application. It is difficult for agencies to refuse to apply a publicized rule consistently because of potential denial of equal protection. In driver licensing, where many people are regulated on the basis of a few criteria, it is not too much to expect a high degree of consistency of application. Proceeding by rules ensures it. Ad hoc methods offer little prospect of public evaluation in terms of equal protection because driver licensing adjudications are not reduced to written opinions.

Fourth, much has been said of the need for a blend of rule making and ad hoc policy making to ensure agency flexibility. It is said that rules that are too specific bind the agency to inflexibility, whereas case-by-case methods permit flexibility. First, there are some areas in which policy is so clear that the licensing agency should not hesitate to make a total commitment. Furthermore, is there not sufficient flexibility inherent in rule making? If a given rule proves to be unworkable, the agency may rewrite the rule. A relatively efficient rule-making procedure permits change without a formal hearing in most circumstances. Admittedly, there is some loss of agency flexibility when policies are reduced to rules, but is this loss not offset by the protection afforded the interests of PEOPLE who are subject to their regulation? If what is sought is agency efficiency and fairness to individual interests, who is to say this is not an acceptable balance?

Fifth, court review of the type envisioned would not mean court interference with agency policy-making functions but would contribute to the growth of the administrative process, for the court insists that an agency articulate its *own* policy. Concurrently, court review emphasizing agency articulation of its own criteria implies court recognition of agency policy-making POWER. De novo court review is deemphasized. It might be asked, If courts are to review agency decisions de novo (as some statutes permit), why create the agency? Is no confidence to be placed in the ability of the agency to administer the statute fairly and efficiently? Even though charged to review de novo, some courts refuse to do so on the theory it is an improper usurpation of agency authority. Perhaps if agency criteria were well drafted and published as rules there would be less inclination to insist on de novo review of agency action.

Finally, and perhaps most important, is the cumulative impact of these postulated effects of rule making. They press for driver licensing agency recognition of the fact it is controlling interests that are most important to PEOPLE. When the agencies begin to characterize problems in these terms rather than resort to their futile attempts to catalogue interests as rights or privileges in order to decide what kind of treatment the law requires as a *minimum*, they will begin to progress toward agency service of both the public interest (POWER) and the private interest (PEOPLE).

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS AND RECOMMENDATIONS

This research effort may be described as a formal study of the classic authority-liberty conflict in the context of driver licensing. It is an attempt to analyze the formal POWER assertions of government in terms of their impact on the individual interests of PEOPLE in driving motor vehicles. That the POWER assertions may be made is not questioned, but in our scheme of government they are expected to be made on a rational basis. POLICY is the fulcrum on which legal adjustments are made in this conflict, for POLICY is the means by which POWER is transmitted and imposed. However, it is simplistic to assume that driver licensing statutes constitute the policy applied. It is evident that the policies actually brought to bear on applicants and licensees may be something else entirely. Therefore, the analysis attempted to penetrate more deeply and identify the formal substantive decision criteria utilized in the licensing process. Of course, the *formal* policies identified may not be applied. *Informal* policy may actually constitute the heart of the program. Nonetheless, analysis of the formal policies and the legal constraints that may be imposed on them serves as a springboard for future research.

It is readily apparent that both federal and state governments have asserted their authority in the area of driver licensing. At the federal level this occurs through the National Highway Traffic Safety Administration, whereas at the state level it occurs through the driver licensing programs administered by state motor vehicle departments. What must be understood by federal and state officials is that they possess power to govern because of the structure of the statutes that they administer. Lack of precision and outright delegation of power in the statutory language serve to transfer the actual lawmaking authority from the legislative body

to the administrative agency. Many state licensing agencies appear not to recognize that the power is theirs and that they have the means and the responsibility to exercise it. It is not necessary for state motor vehicle administrators to delay creative administrative action until legislative action may be obtained.

Rather than argue the issue of whether it is legitimate to transfer power, it would be more fruitful to simply admit that power is in fact transferred and that the significant question is whether the transferred power is used rationally so as to demonstrate adequate respect for the private interests at stake. In legal terms, power assertions must be both substantively and procedurally rational. As was pointed out in the introduction to the study, it has been traditional to assume that administrative law research should emphasize the procedural aspects of administration. However, the primary purpose of proper procedure is to ensure fair application of rational substantive decision criteria. Thus, a corollary reason for emphasizing substantive criteria is the fact that substantive lawmaking has been too long neglected in administrative law studies. A major assumption of this study is that no amount of procedural fairness or equitable treatment in administration will serve to justify irrational substantive policy.

The purpose of driver licensing systems is to contribute to highway safety by predicting future human failure that leads to involvement in an accident. However, this is very difficult to accomplish because the criterion to be predicted (accident-free driving) is very unstable, the predictors applied are of low validity, and such a large percentage of applicants must be allowed to drive that the selection ratio cannot be manipulated to improve the predictive accuracy of the system. Thus, driver licensing systems cannot be expected to serve as a panacea. Nonetheless, because of public acceptance and support, it is assumed that driver licensing programs will continue to be used as a means of attempting to prevent highway crashes.

Empirical research has demonstrated that, with the exception of alcohol consumption, all licensing predictor policies are of low validity. Some so-called predictors are so obviously irrelevant to the goal of preventing driver failure as to be patently unconstitutional. An example of attempts to structure rationality into driver licensing decisions is the medical advisory board programs that have been established in several states. However, the medically trained board member must also rely on low-validity criteria, for medical conditions have not been established as having greater predictive value than other licensee characteristics. Furthermore, there is danger that medical advisory boards may be subtly permitted to make the legal-policy decision whether a given individual should be allowed to drive. The nature of the question addressed to the board (*e.g.*, can he drive safely?) or undue reliance by the administrative officer on the board's recommendations may have this effect. However,

medical boards could help ensure decisional consistency by articulating medical licensing criteria to be applied to all applicants and licensees.

In short, the current predictor policies used in driver licensing systems may simply cost too much in terms of loss of efficiency of movement because they are such poor predictors of future accident involvement. Similarly, society is coming to understand that accident *involvement* is not to be equated with accident *causation*. Lack of confidence in the predictor policies coupled with the extreme need to drive serves to create a form of social tension that may subtly destroy the foundation of driver licensing. That is, if tensions rise to an unmanageable level, people may ignore licensing controls and drive with or without licenses. The licensing system is premised on the assumption that people are law-abiding and do not drive when told they may not do so. However, there are some disturbing studies that suggest that relatively large percentages of society drive vehicles either without being licensed or while the license is withdrawn.

Point systems are often assumed to be a more effective means of identification of errant driver behavior that justifies license withdrawal. However, research has shown that there is a poor correlation between the traffic violations on which point systems are based and future accident involvement. Thus, point systems may predict poorly or not at all. However, they have a salutary legal effect in the sense that they quantify the decision criteria and contribute to procedural due process and equal protection for licensees. The critical element in a respectable point system is the assignment of point weights on the basis of the statistical relationship to accident records rather than on the basis of personal opinion as to the seriousness of various offenses. It is this relative weighting of offenses that establishes the predictive validity of any point system. Even so, several authorities have suggested that respectable point systems and other license withdrawal criteria should be used for diagnostic purposes only to identify drivers in need of further training or rehabilitation. Because they are such poor predictors, current criteria should not be used to withdraw licenses.

Because alcohol consumption has been shown to be highly correlated to accident involvement, implied consent statutes are probably beneficial legal policies. The federal case law appears to support their constitutionality. However, the rationale justifying implied consent statutes is based largely on the assumption that blood test searches of the human body are not *unreasonable* searches *per se*. Because of the reasonableness requirement inherent in this constitutional concept, each application of the statute must be evaluated to determine whether constitutional rights were violated. Constitutionality in *principle* is not to be equated with constitutionality in *application*. In implied consent cases proper application is critical to the protection of substantive rights. Because preliminary studies suggest that implied consent statutes are effective in reducing

highway crashes, they may be expected to be widely implemented. Hence, adequate controls on their application must be imposed.

The licensing significance of implied consent statutes arises out of the fact that licenses are withdrawn if the licensee refuses to submit to a test. An administrative hearing is provided to evaluate the circumstances surrounding the request, but there may be an attempt to limit the hearing to rather perfunctory issues. Limiting the hearing issues is not permissible unless it is concluded that driving is a "mere privilege" or that government may withdraw licenses on the basis of refusal to consent to an *unreasonable* search of the body.

Hardship licensing has been much maligned by motor vehicle administrators. However, because the withdrawal predictor policies used are of such low validity, it may serve as a valuable means of reducing the tension that would arise if the license were withdrawn. Hardship licensing is obviously incongruous with the privilege doctrine and is evidence that some states formally recognize that in some circumstances the need to drive may outweigh safety considerations.

The import of the evidence that licensing predictor policies are of low validity and the concurrent inability of a driver-selection system to select accurately appears to justify much more extensive use of restricted, hardship, and probationary licensing techniques as driver control measures. Concurrently, such limited licensing may help reduce tensions and may serve to create more respect for licensing control measures. Increased respect for control measures may promote compliance and serve as an alternative to the practice of driving without a license. Therefore, limited licensing offers a valuable opportunity to provide essentially the same degree of safety input from driver licensing systems while giving greater recognition to the individual need to drive.

Congressional insistence on "strict uniformity" in driver licensing and its requirement that the NHTSA adopt uniform standards expressed as performance criteria may constitute federal preemption of state driver licensing standard-setting. In addition, because of the statutory charge to "improve driver performance," the NHTSA has a responsibility to monitor state licensing programs to ensure that they do not needlessly deprive persons of their opportunity to drive. Whether or not there is legal preemption, eventually there will probably be preemption in fact. Federal funding conditioned on compliance with NHTSA standards may be expected to have this effect.

There can be little doubt that the motor vehicle is the overwhelming choice of mode of movement for the vast majority of Americans. As such it obviously represents valuable social interests. Furthermore, a clearly discernible trend in the state case law indicates that this valuable social interest is being given more recognition as a legally protected social interest. Concomitantly, the U.S. Supreme Court has recognized liberty of mobility or right to travel as constitutionally protected. Because the motor vehicle is the primary means by which this mobility and right to

travel are expressed and because a driver's license is required to operate a motor vehicle legally, the driver's interest in his license may likewise be characterized as legally protected. The groundwork for this hypothesis was laid by the author in an earlier research effort published as *The Legal Nature of a Driver's License*.

It is the author's conclusion that one of the primary means by which substantive protections may be afforded licensees must occur in large measure through agency promulgation of rules and regulations that identify the actual criteria of decision. Millions of licensees are subjected to the authority of licensing agencies. Because of the sheer volume of work it is obvious that some standardizing, some mechanizing of the decision process and the decision criteria used must have been created in the 40 or more years during which licensing programs have been in effect. Most licensing agencies may be expected to have created a staff manual in which both substantive and procedural criteria appear. Where this is the case the question may be asked, If you are capable of articulating the decision criteria in a manual, why have you not done so in departmental rules and regulations? That the agencies have not articulated adequate rules and regulations is apparent from Parts II and III. Furthermore, rules and regulations are essential for the reason that administrative licensing decisions are not published and made available for analysis. Again the sheer volume of decisions makes publication prohibitively expensive. As a result, candid articulation of decision criteria is imperative.

Contrary to the usual construction given *SEC v. Chenery*, there is no justification for ad hoc policy making by agencies that already know how they will handle the vast majority of the cases that come before them. As *Chenery* recognizes, where a problem is not reasonably foreseeable, or where the agency lacks sufficient experience with the problem, or if the problem is so complex as to not be capable of being stated as a rule, agency policy-making flexibility must be protected by allowing ad hoc action.

Information that is readily available (*i.e.*, requiring no special effort to obtain it) is appallingly sparse. Administrative materials were collected from agencies by inquiring as would an attorney or an interested citizen. No superhuman effort was made to obtain these materials, for one of the goals of the study was to determine to what extent information is provided on the basis of normal requests. Of course, a personal trip to a motor vehicle licensing agency and an interview could be expected to produce additional information and additional insights. However, it is believed that agencies that assert governmental power have an obligation to the interested public to make readily available any information as to how that power is being used in order that the public may judge how it is being governed.

To insist on agency rules and regulations appears to be within the power of the courts. There are cases that demonstrate court use of due

process and equal protection to make this demand. It is elementary that courts may review statutes and rules and regulations as to their legality and the extent of such substantive review is properly limited in scope. Nonetheless, if courts do not perform this evaluative function, it will probably not be performed anywhere in government. Legislatures and executives have not demonstrated any particular interest in doing so. Hence, it falls to the courts to ensure the protection of the rights of PEOPLE. But if courts are to make even a limited review of licensing predictor policies, they must be made known to the courts. It is submitted that, where decision criteria may reasonably be expected to exist, the courts may justifiably order their articulation as a matter of "positive" due process. To do so permits not only court evaluation but also public evaluation as well. This sort of demand would not involve the court in unduly usurping the policy-making authority of the licensing agency. In effect, the court is asking the agency to state candidly the policies the agency created and the agency applies. Professor Kenneth Davis appears to have come to a similar conclusion, for this is the thrust of his book, *Discretionary Justice*. However, his application of the principle is limited to informal adjudication contexts.

There is one pitfall that the courts must avoid in the process of determining whether there is a rational relationship between driver predictor policies and the public purpose goal to be served. That pitfall is an overly broad statement of the goal of driver licensing systems. "Highway safety" is obviously the ultimate goal of all highway transportation safety programs. However, the goal of driver licensing is more precisely and accurately defined to be the prevention of driver failure that leads to involvement in highway crashes. If the interim goal of driver licensing is stated precisely rather than generally, predictor policies that would otherwise appear to be reasonably related may be viewed instead as irrelevant and unconstitutional assertions of POWER that unduly infringe on the interests of PEOPLE.

In summary, it may be stated that courts have a legitimate role in making limited substantive review of driver licensing criteria. To perform their critically important role as protectors of the interests of PEOPLE, courts must recognize that the rationalizations put before them as "findings" and "conclusions of law" do not necessarily state the actual decision criteria applied. Unless the court insists on more specific information, the interests of PEOPLE may suffer unjustifiably, for the limited scope of court review will have been perfunctory in many cases. Such review is arguably a denial of due process and equal protection expectations—expectations that courts are supposed to fulfill. If decision criteria are obtained, the court may limit itself to evaluating their rationality and thereby avoid injecting itself improperly into the policy-making authority of the agency. This embellishment on court review of agency action should not be objectionable, for it does not constitute an attempt to judicialize the administrative process or subvert agency authority. Yet it does provide

an additional measure of protection for individual interests. Not only are the interests of the individual involved in the specific case protected, but those of the driving society are also protected. If decision criteria are ordered to be made known as part of court review, they may also be scrutinized by the interested public. Furthermore, current case law trends in the areas of ripeness and standing would permit them to be subjected to immediate court evaluation as policy pronouncements without awaiting their application in a case. Therefore, in the substantive administrative law sense, the "positive" due process concept appears to present an additional legal technique for limiting unwarranted assertions of governmental power at the expense of the interests of PEOPLE while at the same time respecting the efforts of licensing officials to promote safety on highways.

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